88-185

In The
Supreme Court of the United States
October Term, 1988

LINK MANUFACTURING COMPANY,
Petitioner

v

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Whether the Court of Appeals has sanctioned an extreme departure from the accepted and usual course of National Labor Relations Board proceedings by enforcing the Board's order holding eligible and counting the votes in a Board Representation Election of two permanently laid off employees, where there has been no determination that the laid off employees had a reasonable expectation of recall.

II

Whether permanently laid off employees with no reasonable expectation of recall and no bona fide interest in employment at a Company may determine the outcome of a Board Representation Election, thereby affecting the organizational rights of the remaining employees, who have legitimate interests in employment at the Company.

III

Whether the Court of Appeals has sanctioned an extreme departure from the accepted and usual course of National Labor Relations Board proceedings by enforcing the Board's Decision That Five Layoffs Were Improperly Converted from Temporary to Permanent Status as a result of Alleged Anti-Union Motivation, where the Decision Was Not Supported by Substantial Evidence.

LIST OF PARTIES

The parties to this cause of action in the Court of Appeals for the Sixth Circuit were:

1. National Labor Relations Board.
2. Link Manufacturing Company.

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Link Manufacturing Company, 281 N.L.R.B. No 28 (1986), *affirming* Nos. 7-CA-23912, 7-CA-23960 and 7-RC-17388 (March 6, 1988, Giannasi, A.L.J.).

JURISDICTIONAL STATEMENT

1. Petitioner seeks review of the February 29, 1988 Judgment of the United States Court of Appeals For the Sixth Circuit and of that Court's April 13, 1988 Order denying Petitioner's Petition For Rehearing.

2. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

The present case involves an interpretation of 28 U.S.C. §157(1976), providing

> "Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities*, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)."
> [Emphasis added].

I. STATEMENT OF THE CASE

In this case, permanently laid off employees with no reasonable expectations of recall may determine whether Link Manufacturing Company employees with legitimate employment interests will be represented by a union. The present case involves a Union Representation Election and two charges over the layoffs of several employees. The Statement of Facts is necessarily detailed in order to give this Honorable Court a proper understanding as to the economic situation confronted by the Petitioner in determining layoffs were necessary.

The Representation Election, Case No. 7-RC-17388

The Petition in Case No. 7-RC-17388 was filed by the UAW on Friday, August 10, 1984 and served by mail on Link Manufacturing Company (hereinafter Link) on Monday, August 13, 1984 at approximately 10:00 a.m., (ALJ D. p 4) An Election was held on September 27, 1984, pursuant to a Stipulation, (Jt. 1, 2, 3). The Tally of Ballots showed that there were approximately 52 eligible voters, that 53 ballots were actually cast, and that 23 votes were cast against the Union, 25 votes were cast for the Union, three voters were challenged by the Union, and two voters were challenged by the Board, (Jt. 1, 2). No Objections were filed, (Jt. 2 p 2).

On October 10, 1984, the Regional Director issued a Notice of Hearing on Determinative Challenges, regarding all five

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All references to the transcript of the Hearing before Administrative Law Judge Giannasi will be designated in parentheses by the abbreviation "Tr." All references to Exhibits presented by the Counsel for the General Counsel will be designated in parentheses by the abbreviation "GC." All references to Exhibits presented by Link will be so designated in parentheses. All references to Joint Exhibits will be designated in parentheses by the abbreviation "Jt." All references to Exhibits presented by the Administrative Law Judge will be designated in parentheses by the abbreviation "ALJ." All references to the Decision of the Administrative Law Judge Giannasi will be designated in parentheses by the abbreviation "ALJ D". All references to the Decision and Order of the National Labor Relations Board will be designated in parentheses by the abbreviation "Bd."

challenged ballots, (Jt. 1). On October 23, 1984, a Hearing was held before a Hearing Officer who refrained from taking evidence relating to the challenged ballots of Chwastek and Culbertson, due to the filing of an unfair labor practice charge in Case No. 7-CA-23960, (Jt. 4 pp 84–91, 109–111). At that Hearing, the UAW attorney stipulated that the layoffs of Chwastek and Culbertson were permanent, (Jt. 4 pp 86–90). On December 17, 1984, after his authority to decide the eligibility of Chwastek and Culbertson was withdrawn, the Hearing Officer issued his Report and Recommendations on three of the Challenged Ballots, finding that the Union's three challenges should be overrulled, (Jt. 2). On February 5, 1985, the Board adopted this Report and directed the Regional Director to count these three ballots, (Jt. 1). A Revised Tally of Ballots was then issued showing that 26 votes had been cast against the Union, and 25 votes had been cast for the Union, with the two challenged ballots of Chwastek and Culbertson remaining as outcome determinative, (GC 1h).

The Initial Charges Over the Layoffs of Chwastek, Culbertson, Jones, and Myers, Case Nos. 7-CA-23755 and 7-CA-23755(2)

On August 16, 1984, the UAW filed a charge, Case No. 7-CA-23755, alleging that the layoffs of Culbertson, Chwastek and Jones violated the Act, (Link 7). This charge was dismissed by the Regional Director on October 3, 1984, for the reasons expressed in his Summary Report, (Link 8). On August 23, 1984, the UAW filed a charge, Case No. 7-CA-23755(2), alleging that the layoff of William Myers violated the Act, (Link 9). This charge was dismissed by the Regional Director on September 11, 1984, (Link 10). Neither dismissal was appealed, (Jt. 4 pps. 88, 89).

The Second Charge Over the Layoffs of Chwastek, Culbertson, and Jones, Case No. 7-CA-23960

On October 23, 1984, the UAW filed a charge, Case No. 7-CA-23960, containing the same allegations previously dis-

missed in Case No. 7-CA-23755, (GC lc). On November 30, 1984, an Order Consolidating Cases and Complaint issued over some of the allegations of this charge along with some of the allegations contained in Case No. 7-CA-23912, (GC le). The Complaint does not allege that the layoffs of Chwastek, Culbertson, and Jones were unlawful, but only that their layoffs and those of George Elswick, Millard Petrey, and Chris Venticinque (three additional former employees that were not even named in any charge) were unlawfully converted from temporary to permanent, (GC le). On February 19, 1985, the Regional Director issued its order Consolidating the Unfair Labor Practice and Representation Cases.

The Decisions Below

On March 6, 1986, ALJ Giannasi rendered his Decision, finding that the layoffs of Chwastek, Culbertson, Elswick, Jones and Petrey were unlawfully converted from temporary to permanent status. In order to remedy the violation, ALJ Giannasi ordered that the layoff letters be rescinded and the employees returned to their *status quo ante* as temporarily laid off employees, (ALJ D. p. 27). ALJ Giannasi recognized that laid off employees are only "entitled to vote if they are deemed on temporary layoff with a reasonable expectation of recall," (ALJ D. p 25). However, in resolving the election issue, ALJ Giannasi considered Chwastek and Culbertson "to be temporarily laid off and eligible to vote in the 27 September 1984 election and their ballots should be opened and counted," (ALJ D. p 26), without determining whether each had a reasonable expectation of recall. Link filed Exceptions, a supporting Brief and an Answer to GC's Cross-Exceptions. GC filed Cross-Exceptions and a supporting Brief. On September 2, 1986, a three member panel of the Board issued its Decision and Order, substantively affirming the ALJ's Decision in this regard.

On November 18, 1986, the Board filed its Application for Enforcement of its Decision and Order to the Sixth Circuit Court of Appeals, which Link opposed. On February 29,

1988 the Sixth Circuit Court of Appeals issued a 1½ page per curiam opinion granting enforcement the Board's Decision and Order, holding substantial evidence existed to support the Board's Decision and Order. On March 11, 1988 Link filed a Petition for Rehearing and/or Rehearing EnBanc, which was denied on April 13, 1988. Link seeks before this Honorable Court review of the Board's Decision and Order and the Sixth Circuit's Order granting enforcement.

II. STATEMENT OF FACTS

The Nature of Link's Business and Its Operations

Link has been a job shop engaged in the production of shafts for automobile engines and other motors since 1939, (Linklater Tr. 328; GC 15 p 1; ALJ D. p3). The Company has three buildings at its facility, has six separate Departments entitled Grinding, Secondary, Screw Machine, Inspection and Quality Control, Shipping and Receiving, and Administrative, and has employed 30 to 50 employees throughout its history, (Linklater Tr. 328, 329; ALJ D. p 3).

Over the past few years, Link's major customers have included Ford, Robbins & Myers, Roper, Condamatic, and Toledo Stamping, (Linklater Tr. 334, 335). The Company bids for jobs from these and many other companies, including many small volume jobs, on a competitive basis, (Linklater Tr. 334, 339, 397, 398, 427). Orders received by the Company are either spot orders, an order for amounts of specific parts due at specific times, or blanket orders, which are orders for a certain number of pieces per month on an ongoing basis, (Linklater Tr. 436; GC 15, p 9).

Link is wholly-owned by George Linklater, Jr., who also serves as its president, (ALJ D. p 3). Stan Sikora is the plant manager and Joe Venticinque is the plant engineer, (ALJ D. p 3). Linklater, Sikora and Venticinque are salaried, are the only individuals of Link with their own authority to hire, fire, discipline, or lay off employees, and are supervisors under the National Labor Relations Act, (Linklater Tr. 393;

Uroda Tr 552–553; Jt. 2 pp 3, 5, 6, 9; Jt. 4 pp 250–253, 261,262; GC 15, p 7; ALJ D. p 3). Martha Collier is the Company's sole clerical employee and serves as Link's secretary and bookkeeper, (ALJ D. p 3; Collier TR. 535, 537).

Dick Napp, a 27 year employee, is the Leader of the Screw Machine Department (four employees), while Ed Stechow, an 11 year employee, is the Leader of the Secondary Department (10–15 employees), (Jt. 2 pp 3–11; Jt. 4, p 185; Jt. 5–11). Ed Uroda, a 22 year Employee of Link Manufacturing Company, was the Leader of the Grinding Department (17–25 employees) until his retirement in December of 1984, (Uroda Tr. 552; Jt. 2, Jt. 5–11). These three individuals are hourly paid and spend the vast majority of their time setting up and running machines, (Jt. 2; Jt. 4, pp 197–199). Napp, Stechow and Uroda have never had the authority to discipline, discharge or lay off employees, (Linklater Tr. 393, 457; Uroda Tr. 553, 554; Jt. 2; Jt. 4, pp 134–138, 165–166, 192–194, 232–234).

Link's Grinding Department

The Company performs two different types of centerless grinding within its Grinding Department — In-Feed and Through-Feed grinding, with In-Feed Grinding also known as and referred to as Plunge Grinding, (Culbertson Tr. 292; Linklater Tr. 330, 331, 439, 441). Many of the jobs that require grinding require only a single In-Feed operation or a single Through-Feed operation and there are a number of jobs that require only In-Feed grinding, (Linklater Tr. 331, 334, 397).

In-Feed grinding machines are used to perform the more difficult multiple diameter grinding operations, so an In-Feed operator must be able to set cams and grinding wheels, (Linklater Tr. 330–31, 439, 441). Through-Feed grinding is less complicated, so Through-Feed Grinder Operators are not required to be as skillful as In-Feed Grinder Operators, (Linklater Tr. 331, 441; ALJ D. p 3). Because a Through-Feed Operator requires very little skill and experience, Link

has been able to utilize In-Feed Grinder Operators, temporary employees, janitors, and its Shipping Clerk, to run Through-Feed Grinders throughout the years, (Guthrie Tr. 100; Diperna Tr. 264–267, 278–280; Culbertson Tr. 316; Linklater Tr. 439, 441; Uroda Tr. 558). No Through-Feed Operators have ever run In-Feed grinding machines, (Chwastek Tr. 216, 220; Culbertson tr. 317). Before 1984, Link never employed more than 2 Through-Feed Operators and usually employed approximately 10 to 12 In-Feed Operators, (Linklater Tr. 336, 395).

The Company's Layoff Policy Due to Work Reductions

The Company conducts layoffs due to reductions in work by classification seniority within each Department rather than by plant-wide seniority. Probationary employees within the affected classification are laid off first, then seniority employees within the affected classification are laid off in reverse order of seniority as long as the employees remaining can do all the work required of the classification, (Linklater Tr. 447–448; Jt. 4, p 250; GC 15 p 17; ALJ D. p 4). This has been Link's policy for prior layoffs due to lack of work, in 1980–1983, (Jt. 40, 70–72). Like many job shops, Link has often needed to hire workers or work overtime in a busy Department at the same time it conducts layoffs in other Departments which are not busy, (Jt, 5–7, 40; GC 15 p 17). In July of 1984, Link laid off a Secondary Operator and two Inspectors, while it was hiring five In-Feed Grinder Operators, (Linklater Tr. 346–364; Jt. 5, 6, 40; GC 15, pp 18, 19).

The Company's Use of Temporary Employees

Link has utilized temporary employees through employment agencies for a wide variety of jobs including operating Through-Feed grinders for over 20 years, since temporaries are cheaper than regular full-time employees and allow the Company great flexibility when work requirements fluctuate, (Chwastek Tr. 216, 229; Diperna Tr. 279; Culbertson Tr. 316; Linklater Tr. 399, 400, 440, 482, 483, 529, 530; Uroda Tr. 557, 558; Jt. 75; GC 15, p 15). From 1977 through

1979, Link relied heavily on temporary employees, (Jt. 75; GC 15, p 15). In 1981, during the automotive recession, Link dramtically increased its use of temporary employees while at the same time reducing its regular full-time workforce to approximately thirty employees. In 1982 and 1983, when the automotive recession ended, Link reduced its use of temporary employees while it increased its numbers of regular full-time employees, (Jt. 70, 72, 75; GC 15, p 15). In January of 1984, the Company again used temporary employees heavily for a total of 461.25 hours, (GC 15, p 15, Ex. 15).

The Through-Feed Grinding Work in 1984

Link had been a successful bidder on four drive shafts for Roper Lawn Products from July 1, 1982 through July 31, 1983, (Linklater Tr. 423; GC 15, p 10, Ex. 9). On July 29, 1983, Link received a purchase order to continue providing two of these four shafts through July 31, 1984, but to maintain even this work, was required to reduce its price per part by over 25%, (Linklater Tr. 422–424; Link 20; GC 15, p 10, Ex. 9). In January of 1984, Link received a new job for Robbins & Myers consisting of 80,000 shafts, all requiring Through-Feed grinding, which had to be delivered periodically to its Hunter Fan Division in Memphis, Tennessee by May 14, 1984, (Link 19; Linklater Tr. 420, 421). Link was also producing a part for Condamatic, one of two suppliers on that part for Ford, a shaft for Robbins & Myers' Sandusky Plant, and a rocker arm for Toledo Stamping, all of which required significant Through-Feed grinding, and two Distributor Shafts for Ford which required minimal Through-Feed grinding in a single operation, (Jt. 78; Linklater Tr. 422–444, 448, 501; GC 15, pp 11–13).

The increase in Through-Feed grinding from the new Robbins & Myers job along with the apparent steadiness of the other Through-Feed grinding caused Linklater to hire Chwastek, Jones and Culbertson in January of 1984 as additional Through-Feed Operators, raising the Company's complement of regular Through-Feed employees to five, the highest level in

the Company's history, (Culbertson Tr. 310, 311; Linklater Tr. 448, 457; Jt. 6).

On May 14, 1984, there was an engineering change made by Robbins & Myers on the shaft being produced for the Hunter Fan Division forcing Link to rebid that job, (Linklater Tr. 426, 427). Link offered to continue producing the part at the same price per piece, but in July was informed that because it had not reduced its price it would lose the job, (GC 15, p 11; Linklater Tr. 428).

In late June, Linklater learned from Condamatic's purchasing agent and directly from Ford's quality control people that Condamatic was having quality problems on the shaft it was supplying to Ford, (Linklater Tr. 444, 446). By Mid-July, Linklater found out that Condamatic was going to lose the job which meant that Link would also lose work, since it was performing the Through-Feed grinding work on this shaft for Condamatic, (Linklater Tr. 445, 446, 502; GC 15, p. 12). Ford directed Condamatic to ship the parts remainingin the float on a reduced schedule through December, which caused Link to have reduced shipments of its Through-Feed work for Condamatic in August and September and to finish that job by December, 1984, (Linklater Tr. 446, 447; Jt. 78).

Shortly before the Purchase Order expired on July 31, 1984, Roper advised Linklater that Link had been underbid for the drive shafts for the next year by a competitor and would not receive any more work on these parts in the future, (Linklater Tr. 424–426, 436; GC 15, p. 10; Link 20). The Company finished that work in August after the Purchase Order expired, (Linklater Tr. 424–426, 436).

The Delays in the Ford Distributor Shaft Jobs

Link had obtained two major orders from Ford for distributor shafts, (Link 21, 22; GC 15, p 12). The first order originally called for 86,000 pieces while the second order originally called for 180,000 pieces to be shipped from May 1, 1984 through September 30, 1984, (Link 20, 21). These

jobs were to be performed by Link until October 1, 1984 when Ford anticipated being able to run them in-house, (Linklater Tr. 434; GC 15, p 13). The two jobs involved blanking in the Screw Machine Department, Secondary operations, In-Feed grinding and minimal Through-Feed grinding, but were delayed in late June, late July, and early August, (Linklater Tr. 434, 438, 450–453, 493, 501). After being advised of the delays in August, the Company reduced its production and shipments so that as of September 21, 1984, it had only shipped 11,100 pieces of the second shaft and 44,670 pieces of the first shaft (Linklater Tr. 450–453; GC 15, p 13, GC 14 p 9). Work on these shafts stayed low through August and September, picked up in October through December, and then was terminated in 1985 when Ford took these jobs in-house, resulting in a permanent loss of work to Link, (Linklater Tr. 453; GC 15, pp 13, 14.)

The Need for Reductions in the Work Force

In late July and early August, due to the significant loss of Through-Feed work, the delays in the Ford shafts, and the uncertainty over the future, Link considered going out of business, (Linklater Tr. 457, 458). The sudden, unforeseen, yet significant loss of Through-Feed work from Roper and Robbins & Myers, the delays in the Ford shafts and realization that this work would be going back to Ford "in-house", within a few months, and, the lack of prospects for future Through-Feed work, caused Linklater to feel that permanent layoffs would be necessary since large permanent losses of business which would not be replaced had previously caused permanent layoffs, (Linklater Tr. 489; Jt. 40).

On July 23, 1984, Screw Machine Setup and Operator Aho was terminated and on July 31, 1984, Charles Costello, a Setup person in the Secondary Department since December 30, 1983 quit his employment, (Jt. 5–7; GC 15, pp 18, 19). A total of 10 more production and maintenance employees who quit or were laid off between July 31 and November 5, 1984 were not replaced, (Link 18; Jt. 5–10; GC 15, pp

23, 24; Linklater Tr. 418). By September, 27, 1984, Link's complement of production and maintenance employees had been reduced to 51 from its July 1, 1984 level of 60, (Jt. 6–9).

The August 1984 Layoffs

Since Linklater was convinced that the In-Feed grinding work on the Ford shafts would be significantly delayed, he directed Sikora to lay off Petrey and Elswick, two of the probationary In-Feed Grinder Operators, (ALJ D. p 4; GC 14, p 12). Sikora did that on Friday, August 3, 1984 before leaving on a one week vacation, (Linklater Tr. 360, 363; Link 18; GC 15, p 19). Linklater testified that he intended their layoffs to be permanent at that time, (Linklater Tr. 458, 459).

On August 7, 1984, Norm Feldman, the senior Through-Feed Grinder Operator, and Ed Uroda, the Grinding Department Leader, approached Linklater and explained that there was insufficient Through-Feed work for all the Through-Feed operators to even work through that day, (Linklater Tr. 455, 456; Uroda Tr. 555, 556; ALJ D. p6 fn 6; GC 15, p 20). Linklater directed Uroda to advise Chwastek, Culbertson, and Jones that they would be laid off that day due to lack of work, (Linklater Tr. 365, 366, 456, 556; ALJ D. p 6 fn 6). These three employees were selected for layoff because they were the least senior Through-Feed Operators and had originally been hired in January to perform the increased Through-Feed work that was coming through at that time, (ALJ D. p 4; Linklater Tr. 447, 448, 457). Chwastek, Culbertson, and Jones had only performed Through-Feed grinding work and had primarily worked on the Roper and Robbins & Myers accounts, (Jones Tr. 59; Chwastek Tr. 220; Culbertson Tr. 306, 315–317; Linklater Tr. 447).

Linklater testified that he intended these layoffs to be permanent, (Linklater Tr. 458). Linklater merely told Uroda to lay them off and did not tell him anything about the length of time of the layoffs or that their layoffs would be

temporary, (Linklater Tr. 456; Uroda Tr. 557; ALJ D. p 6; Link 8). At the time, neither Uroda nor Linklater knew whether any Union organizing activity was going on, (Diperna Tr. 254, 255; Uroda Tr. 557; Link 8). Uroda had no idea how long the layoffs would last since he has no contact with customers and did not know the Company's future work requirements, (Uroda Tr. 553; Jt. 4, pp 229, 254, 255). Uroda simply told Chwastek, Jones and Culbertson that he was sorry but that they had to be laid off at lunch time due to lack of work. (Jones Tr. 61, 62; Uroda Tr. 557; Jt. 4, pp 119, 240, 241).

On August 8, 1984, Linklater drafted a form letter to be sent to Chwastek, Culbertson, Elswick, Jones and Petrey confirming their layoffs, (Linklater Tr. 484; Jt. 42, 43, 44, 45, 46; GC 15, p 21). Linklater gave one letter to Martha Collier on either August 8 or August 9, 1984 and directed her to send that letter to each of those individuals, (Collier Tr. 538). The letters were typed and put on Linklater's desk on the afternoon of August 8 or August 9, 1984, when Linklater was not there, (Collier Tr. 538, 539).

Linklater was involved in a local golf tournament, which he had won in the past, and did not go into work on the afternoon of August 9 and all day on Friday, August 10, 1984, (Linklater Tr. 336, 404, 405, 411–416; Link 15, 16, 17; Collier Tr. 539–540; GC 15, p 21).

Linklater's desk was quite full of mail and papers on August 9 and 10, 1984 as it normally appeared, (Linklater Tr. 404; Collier Tr. 541). If the letters were typed and on his desk before he left on August 9, 1984, he did not see them, (Linklater Tr. 404). He did not sign the letters on August 9, 1984 and they remained on his desk unsigned until Monday, August 13, 1984 at about 8:20 A.M., when Martha Collier came in, and reminded him that the letters had not yet been signed, (Collier Tr. 540). Linklater immediately reviewed and signed the letters, before the mail came in, and gave them to Collier for mailing, (Linklater Tr. 367, 417, 418; Collier Tr. 540). Collier gave them to the mailman that day in accordance with the Company's usual procedure, (Phillips Tr. 204; Collier

Tr. 540, 549). The fact that these envelopes were post marked PM was consistent with being given to the mailman at the same time the mailman delivered the UAW Election Petition, (ALJ D. p 14, fn 7).

On August 15, 1984, Linklater realized that the Company did not have sufficient toolmaking work to justify continuing to employ Chris Venticinque, the son of employee Joe Venticinque, in the tool room so decided to lay off Chris Venticinque that day, (Linklater Tr. 367–369; Collier Tr. 546; GC 15, p 22; Link 18). After Linklater discussed the matter with Joe Venticinque, Venticinque phoned his son at home to advise him of the layoff, (GC 15, p 22). On the following day, Linklater directed Martha Collier to type the same layoff letter that had been sent to Chwastek, Culbertson, Elswick, Jones and Petrey, and to give it to Joe Venticinque for Chris Venticinque, (Linklater Tr 367–369; Collier Tr. 541, 545, 546; GC 15, p 22; Jt. 47). The letter written to Chris Venticinque was also dated August 7, 1984 since the original form letter had been made up without specific personal headings, (Collier Tr. 546). The UAW's charge that this layoff was unlawful was dismissed by the ALJ, (ALJ D. pp 15, 16).

At around that time, Linklater realized that he would need to layoff at least one Inspector, so decided to lay off the least senior inspector, William Myers, (Linklater Tr. 360, 367–369; Link 18; Jt. 7, 8; GC 15, pp 23). He advised Myers of his layoff and instructed Martha Collier to send Myers the same letter as had been previously sent to the other six individuals with changes in its date and the dates the paychecks would be available, (Linklater Tr. 369; Collier Tr. 542, 546; Jt. 48). The letter was typed and mailed that day, (Collier Tr. 542, 545, 548). The UAW's charge in Case No. 7-CA-23755(2) over the layoff of Myers was dismissed by the Regional Director on September 11, 1984, (Link 10).

Production After October 1, 1984

Ford asked Link to resume production of a shaft after October 1, 1984 until it could take this work in house, (Tr.

272, 273, 437, 438; GC 15 p 13). In order to satisfy this temporary increase from Ford, the Company needed to run specific In-Feed grinding machines 16 hours per day instead of 8 hours per day, so began working some overtime and transferred three to five employees to a send shift for this purpose, (Diperna Tr. 272, 273; Linklater Tr. 437, 438; GC 15p 13, 14). This Ford Distributor Shaft work remained through December and then was completely finished in January, 1985 when Ford took it "in house", (Linklater Tr. 453; GC 15 pps 13, 14). The Company did use temporary employees in some of this work, (Linklater Tr. 501, 502).

The Company's business with the Bennett Pump Company also declined after August 13, 1984, (Linklater Tr. 523). Throughout the Fall, the Company continued to lose Through-Feed grinding work, including the armature shaft from the Sandusky Plant of Robbins and Myers in early November and the rocker arm job for Toledo Stamping later that month, (Linklater Tr. 448; GC 15, p 11).

The Hours Worked by Senior Through-Feed Operators Feldman and Scully

Between June 2, 1984 and August 4, 1984, while Chwastek, Culbertson and Jones were working full time as Through-Feed Grinder Operators, Scully and Feldman, the two senior Through-Feed Grinder Operators, averaged a total of 89½ hours per week, (Jt. 39 n 7–10, ee 1–3). In the period after the layoffs of Chwastek, Culbertson, and Jones, up to the Election (the weeks ending August 11, 1984 through Sepbember 29, 1984) Scully and Feldman only averaged a total of 74½ hours per week although they were the only Through-Feed Grinder Operators at Link (Jt. 50–57). After the Election, from the week ending October 6, 1984 through the week ending November 17, 1984, Scully and Feldman again averaged a total of only 89½ hours per week while they remained the Company's only two Through-Feed Grinder Operators, (Jt. 57–64).

Culbertson's Claimed Conversation with Sikora

In May or June of 1984, Culbertson was working some overtime and was not allowed to leave early to get to the bank, (Culbertson Tr. 295). Culbertson claimed that he complained about the decision to Sikora by saying that the employees should get a union, and that Sikora responded by saying that the quickest way to lose your job would be to let the old man know he was interested in a union, (Culbertson Tr. 295, 296, 323). Culbertson was not engaged in any organizing activity when this conversation occurred, (Culbertson Tr. 312, 313). Culbertson did not take this conversation seriously, and it certainly did not prevent him from engaging in organizing activity, (Culbertson Tr. 312, 313). Culbertson testified that there may have been someone standing five feet away when this conversation occurred but that he could not recall the identity of that person and did not know whether that person had heard anything, (Culbertson Tr. 324, 325). Culbertson testified that at about the same time, approximately four months after being hired, he received a $.25 per hour wage increase, (Culbertson Tr. 294). This alleged conversation between Culbertson and Sikora over one and one-half months before the organizing drive began was the only comment regarding union activities claimed to have occurred before August 13, 1984, has been specifically denied by the Company in its Answer and prior position statements, and was fully investigated and dismissed on October 3, 1984 by the Regional Director in regard to Case No. 7-CA-23755(1), (GC Exh. lg, GC 14, 15; Link 8; Culbertson Tr. 314). The Regional Director's Summary Report specifically found that even if the statement violated the Act, it was "made to only one employee", and the Board's investigation showed no evidence at the time of the alleged statement of anti-union animus, (Link 8). Despite this evidence and Culbertson's own testimony, the ALJ concluded that the conversation was overheard by "a few" other employees, was taken seriously by Culbertson, and was "clearly unlawful", (ALJ D. p 9, 10).

The 1984 Organizing Drive

The organizing activity that resulted in the currently pending Petition began the last few days of July, 1984, (Culbertson Tr. 296, 297, 317; ALJ D. p 3). Culbertson began distributing union representation cards to employees primarily during breaks and after work in the parking lot, but did not do any of these activities in front of any supervisors, (Culbertson Tr. 297, 303, 314). Culbertson testified that he never saw a supervisor observe him while he was distributing union cards and has no evidence that, prior to his layoff, the Company knew that he had signed or distributed union authorization cards, (Culbertson Tr. 315, 318; Link 8). Culbertson was the only one who distributed union cards and testified that many of the employees who had signed cards were not laid off, (Culbertson Tr. 302, 303, 314, 317, 318). Robin Kish, Jeff Diperna and James Guthrie who had also signed union cards in early August were not laid off at that time, (GC 5, 7, 11; Jt. 7, 8, 9).

Diperna testified that his only union activity consisted of signing a union authorization card on August 1, 1984, attending a union meeting at Culbertson's house and serving as the union's Observer at the Election on September 27, 1984, (Diperna Tr. 255–257). Diperna was never laid off or disciplined in any way between August 1, 1984 and April 17, 1985 when he requested and received a leave of absence for personal reasons, (Diperna Tr. 269, 271, 272).

The only union activity engaged in by Chwastek was that of signing a union card in early August and having a discussion with a female co-worker in the car on the way home from work at about that time, (Chwastek Tr. 211–213; 218; GC 10, which is erroneously dated 7/3/84 instead of 8/3/84). Chwastek did not wear any union insignia, attend any union meetings, tell any supervisor he was interested in the union, participate in any other discussions with anyone regarding the union, or, have any other involvement in the organizing drive, (Chwastek Tr. 218, 219).

The only union activity alleged to have been engaged in by Jones was that of signing a union card on August 2, 1984 at a time when no company official or supervisor was present, but such a card was never even produced as evidence, (Jones Tr. 60, 65). Jones did not wear any union insignia, attend any union meetings, campaign for the union, or participate in any discussions with any company officials, supervisors or anyone else regarding the union, (Jones Tr. 64–66). Jones testified that he had no evidence that the Company was aware that he had signed a union card and no evidence to connect his layoff to his union activities or the union organizing drive, (Jones Tr. 66). Jones never voted in the election of September 27, 1984, (Jones Tr. 67). Culbertson testified that Chwastek and Jones were not involved in the organizing drive other than signing the cards, (Culbertson Tr. 302).

III. ARGUMENT

1. THE COURT OF APPEALS HAS SANCTIONED AN EXTREME DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF BOARD PROCEEDINGS BY ENFORCING THE BOARD'S DECISION THAT FIVE LAYOFFS WERE IMPROPERLY CONVERTED FROM TEMPORARY TO PERMANENT STATUS AS A RESULT OF ALLEGED ANTI-UNION MOTIVATION, WHERE THE DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. *Introduction*

In order to warrant enforcement of its Decision that the layoffs were unlawfully converted, the Board must show that substantial evidence demonstrates first, that protected, concerted activities were a motivating factor in each of these layoffs, and then, must also refute any evidence the Company presents that these layoffs would have occurred even in the absence of protected conduct, *Wright Line*, 251 N.L.R.B. No. 1083, 105 L.R.R.M. 1169 (1980); *N.L.R.B. v. Transportation Management Corp.*, 462 US 393, 113 L.R.R.M. 2857

(1983); *N.L.R.B. v. Townsend & Bottum, Inc.*, 722 F.2d 297, 114 L.R.R.M 3548 (6th Cir. 1983). It is evident that substantial evidence has not been presented to satisfy either element of the *Wright Line* test in regard to any of the layoffs. A Board Decision which is not supported by substantial evidence should not be enforced, *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 27 L.R.R.M. 2373 (1951).

B. Substantial Evidence was not Presented to Demonstrate a Prima Facie Case that Protected Concerted Activity Was a Motivating Factor in the Layoffs of Each of the Five Alleged Discriminatees

Of the five alleged discriminatees (Chwastek, Culbertson, Elswick, Jones and Petrey), only Culbertson engaged in any significant protected concerted activity. There was no evidence presented that showed that the Company was ever aware of Culbertson's activity, or of any union organizing activity, before the Petition arrived in the mail, which was after the drafting and mailing of the layoff letters. Without any evidence of any significant protected concerted activities engaged in by four of the five alleged discriminatees, and without any evidence with the Company had knowledge of the actual union activities that may have been taking place before August 13, 1984, there can be no prima facie case that protected concerted activities were a motivating factor causing the layoffs to be permanent.

There is not one single shred of evidence in this voluminous record that shows that either Elswick or Petrey engaged in any protected activities. They did not appear at the Hearing. No authorization card signed by either one of them, or any other indicator of Union sympathy or activity on their part was presented. Elswick and Petrey simply were probationary Plunge Grinder operators laid off on August 3, 1984. Neither Elswick nor Petrey ever returned to or questioned the Company concerning the nature of their layoffs, and neither one voted in the Election. Since there was no evidence that either Elswick or Petrey ever participated in any

union activity, the Board cannot conclude that their layoffs were unlawfully made permanent, *Hanlon & Wilson Co. v. NLRB, supra.*

The only union activity alleged to have been engaged in by Chwastek was the signing of an authorization card and a brief conversation with one fellow employee in his car while they were driving home from work. The only union activity alleged to have been engaged in by Jones was his testimony that he had signed a card, but no card signed by Jones was ever presented, and he did not bother to vote in the Election.

Even if we accept the allegations of the minimal union activities claimed to have been engaged in by Chwastek and Jones as true, such a remote connection to the Union is insufficient to support a violation, *Restaurant Employees Local 100*, 275 N.L.R.B. No. 133, 119 L.R.R.M. 1224 (1985); *Hanlon & Wilson v. N.L.R.B.*, 738 F.2d 606, 116 L.R.R.M. 3014 (6th Cir. 1984). The insignificant act of signing a card was done by a number of other employees who were not laid off. The fact that many other employees, who engaged in identical union activities consisting only of signing a card, were not adversely affected in any way demonstrates that there was no disparate treatment of any of these individuals. Such a lack of disparate treatment has been relied on by the Board in many prior cases as a primary reason for dismissing unfair labor practice allegations, *Bardcor Corp.* 270 N.L.R.B. No. 157, 116 L.R.R.M. 1505 (1984); *MAC Tools*, 271 N.L.R.B. No. 38, 116 L.R.R.M. 1397 (1984); *Ramada Inn*, 268 N.L.R.B. No. 39, 115 L.R.R.M. 1005 (1983). Additionally, Culbertson himself testified that neither Chwastek nor Jones had any involvement in the union organizing activity other than their signings of a card.

Culbertson repeatedly testified that he was the only employee engaged in union activities and that those activities, before receipt of his layoff letter consisted only of *secretly* distributing union authorization cards during breaktime, lunchtime, and after work, in the Grinding building parking lot

which cannot be seen from the office. Culbertson never told any member of management of his activity, never wore any Union insignia, and never did anything else to identify himself as a Union supporter. *Culbertson testified that the Company had no way of knowing of his union activity, and that he had no evidence that any member of management had any knowledge of it.*

The Company did not have any knowledge that Culbertson was engaged in union activities or that any protected activities were going on before receiving the Petition at about 10:00 a.m. on August 13, 1984. Both Linklater and Collier testified that by the time the Petition arrived, the letters to Chwastek, Culbertson, Elswick, Jones, and Petrey confirming the permanence of their layoffs had been signed, and handed to the mailman. This testimony was consistent with the envelopes' postmarks and the Company's usual mailing procedure. The same form letter was used to notify Venticinque, whose layoff was found to be lawful.

The testimonies from the alleged discriminatees uniformly agreed that the minimal union activity was certainly not being done overtly. Accordingly, it cannot automatically be inferred that the employer was aware of any protected activites that may have been going on, *Metro Center, Inc.*, 267 N.L.R.B. No. 67, 114 L.R.R.M. 1215 (1983).

Standard Motor Products, 265 N.L.R.M. No. 68, 112 LRRM 1383 (1983) held that the termination of an employee from even a small plant was lawful, due to insufficient evidence of employer knowledge of the employee's union activities, since these activities were not carried out in such a manner that the employer must have noticed them. This small plant doctrine only permits the inference of employer knowledge if the Board establishes by other evidence that the employer had reason to notice the union activities, *N.L.R.B. v. Health Care Logistics*, 784 F.2d 232, 121 L.R.R.M. 2873 (6th Cir. 1986). Many recent N.L.R.B. cases have held that actions adverse to employees who had engaged in protected concerted activities which were unknown to their employers

were lawful, *L & W Engineering Company*, 267 N.L.R.B. No. 90, 114 L.R.R.M. 1032 (1983); *Frascona Buick*, 266 N.L.R.B. No. 117, 113 L.R.R.M. 1015 (1983); *Broyhill Co.*, 260 N.L.R.B. No. 183, 109 L.R.R.M. 1314 (1982); *Sedloff Publications*, 265 N.L.R.B. No. 139, 112 L.R.R.M. 1227 (1982); *Arlington House Aluminum, Furniture Division of Plantation Patters, Inc.*, 271 N.L.R.B. No. 62, 116 L.R.R.M. 1505 (1984). The Company's lack of knowledge of an employee's union activity has been relied on by the Board in many cases as primary reasons for dismissing unfair labor pratice charges, *OMSCO, Inc.*, 273 N.L.R.B. No. 116, 118 L.R.R.M. 1249 (1984); *A.J. Schmidt Sprinklers*, 268 N.L.R.B. No. 156, 116 L.R.R.M. 1167 (1984); *Newsday, Inc.*, 274 N.L.R.B. No. 19, 119 L.R.R.M. 1055 (1985).

Accordingly, the mere fact that the layoffs occurred at about the time of the organizing activity is insufficient to satisfy the first element of the burden of proof required under *Wright Line*. Specifically, there was no substantial evidence to support a prima facie case of unlawful discrimination regarding the permanence of the layoff of each employee since protected activities were not shown to have been a motivating factor in the employer's actions.

C. Substantial Evidence was not Presented to Demonstrate That the Layoffs of Chwastek, Culbertson, Elswick, Jones and Petrey Would Not Have Become Permanent in the Absence of Organizing Activity

Even assuming arguendo that there was a prima facie showing that the permanence of these five layoffs was somehow motivated by union activity, a conclusion to which Link strenuously objects, a review of the evidence shows that each of these individuals would have been permanently laid off even in the absence of any organizing activity. The UAW was convinced that the layoffs were actually intended to be permanent at the time they occurred, as its Counsel stipulated on October 23, 1984, at the Representation Hearing, (See Jt. 4 pps. 86–90). There is no question that the layoffs were law-

ful since any allegation that they were otherwise was dismissed twice by the Regional Director and also not found by the ALJ or the Board. In his Summary Report dismissing the charge in Case No. 7-CA-23755, the Regional Director specifically found that Link had lost significant Through-Feed business shortly before the August layoffs. This finding, supported by the UAW stipulation, the testimony of Chwastek, Culbertson and Linklater, and the documentary evidence, should not have been so readily ignored by the ALJ and the Board in reviewing the permanence of the layoffs.

As the Regional Director found, the permanent loss of major Through-Feed work and delay of the Ford Distributor Shafts within a relatively short period of time caused Linklater to decide to permanently lay off seven employees including the five alleged discriminatees in the period between August 3, 1984 and August 20, 1984. Additionally, during the period between August 3, 1984 and the election of September 27, 1984, two Plunge Grinder Operators voluntarily quit their employment. None of the nine individuals who had quit or had been laid off between August 3, 1984 and September 11, 1984 were replaced before November 12 and November 14, 1984, and these individuals were only hired to replace two more Plunge Grinder operators that voluntarily quit. The Company has not advertised for or hired any additional Through-Feed grinders from August 7, 1984, the date of the layoffs of Culbertson, Chwastek, and Jones, through the Hearing Date of September 17, 1985.

A number of recent Board cases have held that layoffs during organizing drives due to business conditions have been lawful, *A.J. Schmidt Co.*, 269 N.L.R.B. No. 104, 116 L.R.R.M. 1461 (1984); *Royal Coach Sprinklers*, 268 N.L.R.B. No. 156, 116 L.R.R.M. 1167 (1984). *American Display Manufacturing Company, Inc.*, 259 N.L.R.B. No. 6, 108 L.R.R.M. 1284 (1981), held that the employer did not violate the Act by laying off six employees shortly after the filing of the Union's Petition even though the employer was actively opposing the organizing drive, since the employer's major customer's

deferral of its largest order necessitated these layoffs. *U.S. Aviex Co.*, 279 N.L.R.B. No. 110, 122 L.R.R.M. 1293 (1986), found layoffs of 33 employees on the day their employer learned of organizing activity to be lawful due to declining sales. In the instant case, Link demonstrated that it had permanently lost major Through-Feed jobs and had sustained indefinite delays in significant work. *This was the finding of the Regional Director in his Summary Report dismissing Case No. 7-CA-23755 and there was no evidence presented at this Hearing that contradicted this finding.* Even Chwastek and Culbertson agreed during the Hearing that the Through-Feed grinding work on August 7, 1984 was down substantially.

Link followed its usual procedure in permanently laying off employees due to a permanent reduction in their work by first terminating probationaries and then, when necessary, seniority employees within the classifications affected in reverse order of seniority. This procedure caused Elswick and Petrey, two probationary Plunge Grinder operators, to be permanently laid off on August 3, 1984, and, resulted in Culbertson, Jones, and Chwastek, the three junior Through-Feed grinder operators, being permanently laid off on August 7, 1984.

Layoffs by seniority within a job classification are certainly a reasonable and legally permissible way of reducing an employer's workforce, since many job shops, including Link, frequently find themselves with a decrease in one type of work at the same time they are facing stability or even an increase in another type of work, *Cherokee Culvert Company, Inc.*, 266 N.L.R.B. No. 50, 112 L.R.R.M. 1320 (1983). The Company's consistent use of its past practice of layoffs by classification seniority undercuts suspicions that the layoffs were for unlawful reasons, *Pullman Power Products*, 275 N.L.R.B. No. 112, 119 L.R.R.M. 1199 (1985); *Allbritton Communications*, 271 N.L.R.B. No. 39, 116 L.R.R.M. 1428 (1984); *Nabisco, Inc.*, 267 N.L.R.B. No. 1236, 114 L.R.R.M. 1152 (1983). As we have noted, neither the Complaint nor

the Decision of the Board alleges that the layoffs themselves were unlawful.

Additionally, the record showed that in July before the organizing drive even began, a probationary employee in the Secondary Department and the two least senior inspectors were also laid off without ever being recalled. *Mid-West Electric Mfg. Corp.*, 260 N.L.R.B. No. 32, 109 L.R.R.M. 1142 (1982), held that the employer did not violate the Act by laying an employee off one day after he attended a union meeting since the layoff was economically motivated and the employer followed its prior policy. *K-C Machine*, 268 N.L.R.B. No. 229, 115 L.R.R.M. 1324 (1984) found the layoff of an employee to be lawful since there were other layoffs at around that time for business reasons, and the employee had low seniority. *This is exactly what happened in this matter and is at least part of the reason for the dismissal of the initial charge.*

Allbritton Communications, *supra*, held that the layoff of eight employees was lawful since the employer did not deviate from its past practice and only three of the employees were known to be active. In regard to the instant matter, Link had no idea of the Union activities or sympathies of any of the 10 employees that were laid off or terminated in July and August of 1984. The record shows that the sum total of union activity even alleged to have been engaged in by Chwastek and Jones, before their layoffs, consisted of signing union authorization cards. Thus, these two individuals were only remotely connected with union activities. A mere remote connection with union activity, no greater than that of other employees who are not laid off, is insufficient to support a violation, *Hanlon & Wilson Co. v. N.L.R.B.*, *supra*; *Restaurant Employees Local 100*, *supra*. Even the fate of Culbertson, who was active in the organizing drive, was identical to that of the nine other employees who were terminated within a few days before and after his layoff, illustrating a lack of disparate treatment, a factor which has resulted in the dismissal of numerous prior charges, *Pullman Power Products*,

supra; *Allbritton Communications*, *supra*; *Bardcor Corp.*, *supra*; *Nabisco, Inc.*, *supra*; *Ramada Inn*, *supra*.

The only evidence which supports the allegations that the layoffs were initially temporary and then unlawfully converted to permanent consists of the initial testimony of Culbertson and Chwastek regarding Uroda's comments, and the ALJ's legally erroneous assumptions concerning the knowledge and authority of Uroda. Chwastek and Culbertson certainly stand to profit by a finding that their layoffs were initially intended to be temporary. Additionally, Culbertson's testimony was inconsistent on this point with his prior testimony in the Representation Hearing of October 23, 1984, and Chwastek's initial testimony that Uroda stated that his layoff would be temporary was inconsistent with his later and more credible testimony that Uroda really stated that he did not know the length of time of the layoff. These inconsistencies were never fully answered by the ALJ. The credible evidence contradicts any claim that Uroda told these employees that they would be temporarily laid off and certainly was sufficient to cause the charge in Case No. 7-CA-23755 to be dismissed and to result in the UAW attorney's stipulation that the charge in Case No. 7-CA-23960 was not contesting the permanence of the layoffs. Further, Uroda had absolutely nothing to do with the decision to layoff Chwastek, Culbertson, and Jones, but was merely the conduit through which this order was transmitted. Linklater said nothing to Uroda or to Feldman as to the duration of the layoffs. Uroda had no way of knowing whether a layoff was to be permanent or temporary because Uroda had no knowledge concerning the Company's future workload or requirements. Only Linklater knew the Through-Feed grinding work that these employees had been hired to perform had been lost to competitors and would not be replaced. Uroda's lack of knowledge concerning the Company's future work requirements is further evidence that any claim made that Uroda defined the duration of the layoffs of Chwastek, Culbertson, and/or Jones, should not have been credited.

Since the layoffs of Chwastek, Culbertson, and Jones, the two remaining Through-Feed grinder operators, Feldman and Scully, have been able to handle the entire workload of the Department, without working significant overtime, with occasional help from In-Feed Grinder Operators and temporary employees, a means of performing this work that the Company has consistently done in the past. Continuing to the present, the Company has not advertised for additional Through-Feed Operators and has not hired any new Through-Feed Operators since it has been able to perform this work with its existing staff.

Link has not recalled any of the employees laid off in July and August of 1984, including the five alleged discriminatees. The Board has held in numerous prior cases that the layoffs of even active union supporters were not unlawful when these individuals were not replaced and no other employees who have been laid off earlier or at about the same time were recalled, especially when the facts showed that some of the employees that suffered layoffs had minimal or no involvement in union activities, *Victor Valley Heating*, 267 N.L.R.B. No. 205, 114 L.R.R.M. 1196 (1983); *Bickerstaff Clay Products, Inc.*, 266 N.L.R.B. No. 171, 113 L.R.R.M. 1071 (1983).

D. Conclusion

There is not one scintilla of evidence on this record that shows that Link had any awareness of any organizing activity before receiving the Petition at approximately 10:00 a.m. on August 13, 1984. By that time, the layoff letters had been drafted, signed, and mailed. Even if we assume arguendo, that the Board met its burden of proving a prima facie case that the permanence of the layoffs was motivated by the employer's knowledge of union activities, it is clear that the Board has failed to show that any of these five alleged discriminatees would not have been permanently laid off due to a legitimate reduction in work regardless of whether or

not union organizing activity was taking place. In enforcing the Board's order, the Sixth Circuit Court of Appeals has sanctioned an extreme departure from the usual and accepted course of Board proceedings since the Board's Decision and Order were not supported by substantial evidence.

2. The Court of Appeals Has Sanctioned an Extreme Departure from the Accepted and Usual Course of Board Proceedings by Enforcing the Board's Order Holding Eligible and Counting the Votes of Two Laid Off Employees Whose Expectations of Recall Were Not Determined and Whose Votes May Affect the Organizational Rights of the Remaining Employees Who Have Legitimate Interests in Employment at the Company.

In the present case, the ALJ determined that the decision to make the layoffs permanent was improperly motivated and thus sought to remedy same by ordering the employees returned to their *status quo ante* as temporarily laid off employees, (ALJ D-p 27). However, in deciding the representation issue the ALJ held Chwastek and Culbertson were "temporarily laid off and eligible to vote, (ALJ D. p 26) without determining their expectations as to recall. Such a quantum leap in logic should not have been sanctioned by the Sixth Circuit.

There can be no dispute that federal labor legislation is primarily concerned with the rights of the individual employees. As well as including the right to organize, form or join a labor organization, employees are also afforded the right to refrain from such activity. Section 7 of the National Labor Relations Act, 29 U.S.C. §157 (1976) provides:

> "Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the

purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities*, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)." [Emphasis added].

The right to choose or reject union representation rests with the employees. In order to effectuate these rights, Representation Elections are conducted by the NLRB to determine whether the majority of employees in an appropriate unit wish to be represented by the Petitioning Union. Eligibility rules have been promulgated to ensure that only those employees with a bona fide interest in employment at the Employer involved will participate in the decision. For these reasons, the Courts and the Board have long and consistently held that whether an employee who has been laid off is eligible to vote in a representation election depends on whether that employee had, at the time of the Election, a reasonable expectation of reemployment. *Tenneco Automotive*, 273 N.L.R.B. No. 14, 118 L.R.R.M. 1054 (1984); *Thomas Engine Corp.*, 179 N.L.R.B. No. 1029, 73 L.R.R.M. 1289 (1972); *Marlin-Rockwell Corp. v. N.L.R.B.*, 116 F.2d 586, 588, 7 L.R.R.M. 353 (2nd Cir. 1941), *cert. denied*, 313 U.S. 594 (1942); *N.L.R.B. v. Hondo Drilling Company*, 428 F.2d 943, 946, 74 L.R.R.M. 2616 (5th Cir. 1970); *N.L.R.B. v. Jessie Jones Sausage Co.*, 309 F.2d 664, 666, 51 L.R.R.M. 2501 (4th Cir. 1962). In fact, this standard was recognized by the ALJ in the instant matter, (ALJ D. p 25) even though he erroneously failed to apply it. The General Counsel also acknowledged the above standard at page 22 of its brief to the Administrative Law Judge. On appeal, the General Counsel's brief simply ignored the Administrative Law Judge's failure to make the requisite determination.

A. Protection of the Section 7 Rights of All Link Manufacturing Company Employees Requires a Determination as to Whether Chwastek and Culbertson had a Reasonable Expection of Recall at the Time of the Election.

In *N.L.R.B. v. D.H. Farms Co.*, 80 L.R.R.M. 3487 (6th Cir. 1972), the Sixth Circuit remanded the case to the Board for a hearing regarding the voting eligibility of laid off employees. In *D.H. Farms*, the company challenged the eligibility of 24 laid off employees. Without holding a Hearing to determine the laid off employees' eligibility, their votes were counted and the Regional Director certified the Union as the exclusive representative of all employees in the unit. The General Counsel then filed a Motion for Summary Judgment requesting the Board to enter a bargaining order. In response, the Company submitted an affidavit which demonstrated substantial and material factual issues concerning the eligibility of the laid-off employees. Nevertheless, the Board granted Summary Judgment and entered the bargaining order. On appeal, the Sixth Court protected the Section 7 rights of the D.H. Farms employees by denying enforcement of the bargaining order and remanding the case to the Board for a Hearing concerning the voting eligibility of the laid off employees.

The present case before this Honorable Court is not significantly different than *D.H. Farms*. Substantial and material issues of the fact exist with respect to the eligibility of Chwastek and Culbertson to vote in the 1984 NLRB Election. In fact, Link contends that none of the laid off Through-Feed Grinder Operators had a reasonable expectation of recall as of the Election Date and that there was no determination made that Chwastek, Jones and Culbertson, or that any of these three individuals had such an expectation on September 27, 1984, regardless of their expectation in August when they were lawfully laid off.

The Robbins & Meyer and Roper jobs for which Chwastek, Jones and Culbertson were hired as Through-Feed Grinders Operators in January, 1984 were all lost by August, 1984.

This loss of work was not disputed and the General Counsel has never disputed the legitimacy of these layoffs. From the period after the layoffs until the election, the remaining two Through-Feed Grinder Operators averaged a combined total of 74-½ hours of work per week. For the seven week period after the election (from the week ending October 6, 1984 through the week ending November 17, 1984) the remaining two Through-Feed Grinder Operators averaged a combined total of only 89-½ hours per week. Since the layoffs and through the Hearing which was concluded on September 17, 1985 the Link did not advertise for or hire any additional Through-Feed Grinders Operators

Certainly, as of the date of the Election, September 27, 1984, the through-feed grinding work would not justify a reasonable expectation of recall of even one Through-Feed Grinder Operator, let alone three. Since Culbertson had the least seniority of the laid off Through-Feed Grinder Operators and since Jones did not vote in the Election, the results of the Election would be unchanged if the Board could only demonstrate that one or two of the three laid off Through-Feed Grinder Operators had a reasonable expectation of recall at the time of the Election. The ALJ and the Board have failed to even analyze the issue of these individual employees' expectation of recall in light of the business conditions. By their failure to address the issue, the Section 7 and rights of the majority of the workers at the Company may be jeopardized by having the votes of Chwastek and Culbertson counted since these two individuals no longer had any bona fide interest in employment at Link Manufacturing Company as of the Election Date.

In order to protect the Section 7 rights of Link's employees, this Honorable Court should grant certiorari and review this issue or, alternatively, remand the case to the Board for a Hearing on the issue of whether employees Chwastek and Culbertson each had a reasonable expectation of recall as of the Election Date.

PRAYER FOR RELIEF

Petitioner respectfully requests that this Honorable Court grant its Petition for Writ of Certioreri, or alternatively remand the case to the National Labor Relations Board for a Hearing on the issue of whether employees Chwastek and Culbertson each had a reasonable expectation of recall as of the Election Date.

Dated: July 11, 1988

Respectfully submitted,

ABBOTT, NICHOLSON, QUILTER, ESSHAKI & YOUNGBLOOD, P.C.

By: /s/ Robert A. Kuhr (P 31371)
Robert A. Kuhr (P 31371)

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TABLE OF CONTENTS TO APPENDIX

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

NO. 86-6207

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LINK MANUFACTURING COMPANY,
Respondent.

ON APPEAL FROM THE NATIONAL LABOR RELATIONS BOARD.

Decided and Filed February 29, 1988

BEFORE: **KEITH, MILBURN** and **NELSON,** Circuit Judges.

PER CURIAM. This case is before us on an application for enforcement of a National Labor Relations Board order. An administrative law judge found that Link Manufacturing Company violated §8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1), by coercively interrogating employees about their union activities, threatening reprisals for selecting a union, promising benefits for rejecting a union, and attempting to convince employees not to vote in a Board election. The ALJ also found that the company violated §§8(a)(3) and (1) of the Act by converting the temporary layoffs of five employees to permanent layoffs in order to prevent the employees from being eligible to vote in a Board election, by suspending employee James Guthrie because of his union activities, and by discouraging union activities generally.

The Board upheld the ALJ's decision, modifying it to include an additional finding that the company violated §8(a)(1) of the Act by unlawfully creating the impression that its employees' union activities were under surveillance. The Board also amended the order to provide that all references to Mr. Guthrie's suspension be expunged from his personnel record and that interest be paid on the backpay owed him.

On consideration of the record, briefs, and arguments, we find that the Board's findings of fact are supported by substantial evidence. Accordingly, and for the reasons set forth in the Board's decision and order, 281 N.L.R.B. No. 28 (Sept. 2,1986), we **GRANT** enforcement of the Board's order.

No. 86-6207

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v. ORDER

LINK MANUFACTURING COMPANY,
Respondent

BEFORE: KEITH, MILBURN and NELSON, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
John P. Hehman, Clerk

281 NLRB No. 28

DJS
D-3956
Oak Park, MI

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

LINK MANUFACTURING COMPANY

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, and AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

Cases 7-CA-23912
7-CA-23960
7-RC-17388

DECISION AND ORDER

On 6 March 1986 Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions, a supporting brief, and an answering brief. The General Counsel filed cross-exceptions and a supporting brief that also answered the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions except as modified herein, and to adopt the recommended Order as modified.

We agree with the General Counsel that the judge erred in failing to find that the Respondent had violated Section

[1]The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

8(a)(1) of the Act by unlawfully creating an impression of surveillance. The judge found that on 12 September 1984 employee James Guthrie was called into the office of the Respondent's owner and president, George Linklater, who asked him how a union meeting had gone the previous day. The judge further found that Linklater told Guthrie that he knew that some 36 employees had signed union cards. Under the circumstances, we find that the Respondent violated the Act by unlawfully creating the impression that its employees' union activities were under surveillance.

We also agree with the General Counsel that the remedy and Order should be amended to provide for interest on the backpay owed to Guthrie because of his unlawful suspension. Finally, we agree that the remedy and Order should direct explicitly that all references to Guthrie's suspension be removed from his personnel records, and that he be notified in writing that this has been done and that evidence of his unlawful suspension will not be used against him in any future personnel action.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Link Manufacturing Company, Oak Park, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(b) and reletter the subsequent paragraphs.

[2] The General Counsel requests that the remedy include a "visitorial clause" authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States Court of Appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary to include such a clause. Accordingly, we deny the General Counsel's request.

"(b) Creating the impression among employees that their union activities are under its surveillance."

2. Substitute the following for paragraph 2(a).

"(a) Make employee James Guthrie whole for any loss of pay or benefits he may have suffered because of the Respondent's unlawful action against him, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977.)"

3. Substitute the following for paragraph 2(c).

"(c) Remove from its records and files any notations dealing with the layoffs and suspension of the employees found to have been discriminated against herein and notify them in writing that this has been done and that evidence of such unlawful conduct will not be used in future personnel actions."

4. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. 2 September 1986

Donald L. Dotson, Chairman

Wilford W. Johansen, Member

James M. Stephens, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate employees about their union activities and those of other employees.

WE WILL NOT give you the impression we are watching your union activity.

WE WILL NOT threaten employees with reprisals, including discharge, and loss of benefits if they select a union.

WE WILL NOT promise employees benefits if they reject a union.

WE WILL NOT attempt to convince employees not to participate in a Board election.

WE WILL NOT convert temporary layoffs of employees into permanent layoffs, suspend, or otherwise terminate or discriminate against employees in order to prevent employees from voting in a Board election, because they vote in an election, or to discourage union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make employee James Guthrie whole for any loss of earnings and other benefits plus interest resulting from his suspension.

WE WILL place employees Culbertson, Chwastek, Jones, Petrey, and Elswick on a preferential recall list as of 13 August 1984 and treat them as temporarily laid-off employees subject to recall from that day forward when and if their former positions or any other work for which they might be qualified becomes available. In the event that these employees would have been recalled, absent their unlawful terminations, WE WILL make them whole for any loss of earnings or benefits plus interest which they may have suffered as a result of our unlawful action.

WE WILL remove from our records and files any notations dealing with the layoffs and suspension of the employees found to have been discriminated against and notify them in writing that this has been done and that evidence of such unlawful conduct will not be used in future personnel actions.

LINK MANUFACTURING COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with is provisions may be directed to the Board's Office, Patrick V. McNamara Federal Building, 477 Michigan Avenue, Room 300, Detroit, Michigan 48226, Telephone (313) 226-3244.

JD-54-86
Oak Park, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LINK MANUFACTURING COMPANY,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, and AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, U.A.W

Cases 7-CA-23912
7-CA-23960
7-RC-17388

Deborah Syx, Esq. for the General Counsel.

James B. Perry, Esq., of *Abbott, Nicholson, Quilter, Esshaki & Youngblood*, of Detroit, MI, for the Respondent.

Tony Martini, of Warren, MI, for the Charging Party.

DECISION

Statement of the Case

ROBERT A. GIANNASI, Administrative Law Judge: This case was tried on several different dates in April, May and September of 1985 in Detroit, Michigan. The Complaint alleges that Respondent violated Section 8(a)(1) of the Act by making coercive statements and engaging in coercive conduct prior to, and in connection with, a Board election which took place on 27 September 1984. The Complaint also alleges that the Respondent violated Section 8(a)(3) and (1) of the

Act by discriminatorily converting the temporary layoffs of six named employees[1] to permanent layoffs so that they would be ineligible to vote in the election and by discriminatorily disciplining and suspending employee James Guthrie because of his union activities.

Consolidated with the Complaint case (Nos. 7-CA-23912 and 23960) is the Representation case (No. 7-RC-17388), which presents the issue of whether the 27 September election was valid. No objections were filed to the election but several challenges were made to the eligibility of voters. After the resolution of certain challenges, the Regional Director issued a revised tally of ballots which showed that 26 votes were cast against and 25 votes for the Charging Party Union, but that two challenged ballots, those of employees Mike Culbertson and Chris Chwastek, two of the employees whose layoffs had allegedly been unlawfully converted from temporary to permnent, remained. Resolution of the challenges depends on the outcome of the Complaint allegation involving Culbertson and Chwastek.[2]

The General Counsel and the Respondent filed briefs which I received on 17 December 1985 and which I have read and considered.

Based upon the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following:

Findings of Fact

I. Jurisdictional Matters

Respondent, a Michigan corporation, which maintains a facility in Oak Park, Michigan, admits that it is an employer engaged in interstate commerce within the meaning of Section 2 (2), (6) and (7) of the Act.

[1] The employees are Michael Culbertson, Chris Chwastek, Donald Jones, Chris Venticinque, Millard Petrey and George Elswick.

[2] It does not appear that the other four laid-off employees voted in the election. Jones testified that he did not vote because he was told it "would be a waste of time." This, of course, was inaccurate, because, had he voted, his vote, like the others, would have been treated as a challenged ballot.

The Charging Party Union (hereinafter the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. The Unfair Labor Practices

A. Background

Respondent is engaged in the production of shafts for automobile engines and other motors. Its facility in Oak Park consists of two adjoining buildings and a third free standing building separated from the other two by a parking lot. The facility is composed of six separate departments, including the grinding department which is housed in the free standing building and employs about half of the respondent's approximately 50 employees. The grinding department contains about 32 grinding machines. Twenty-five of them are in-feed or plunge grinders; seven are through-feed machines. Not every machine is manned by an operator and in-feed or plunge grinders' work is more sophisticated than through-feed work.

The Respondent is wholly-owned by George Linklater, Jr. who also serves as its president. Stanley Sikora is the plant manager and Joe Venticinque is Respondent's engineer and a supervisor within the meaning of the Act. Martha Collier serves as Respondent's secretary and bookkeeper.

In late July 1984, employee Mike Culbertson contacted an official of the Union and obtained blank authorization cards which he then distributed to fellow employees during lunch and other breaks at the plant. In some cases he distributed cards and talked to employees on worktime. On 10 August 1984, the Union filed an election petition with the Board. The Respondent received a copy of that petition at about 10 a.m. on the morning of Monday, 13 August 1984.

On Friday, 3 August, Respondent laid off employees Elswick and Petrey, two plunge or in-feed operators.[3] Elswick and Petrey were among five in-feed operators hired in July. Although Elswick was the least senior in-feed operator, two others had less seniority than Petrey. Linklater admitted that these layoffs were intended to be temporary.[4]

On Tuesday, 7 August, Respondent laid off Culbertson and two other employees who had signed cards distributed by him, Don Jones and Chris Chwastek. They were the least senior of the five through-feed operators then employed, although there were some less senior in-feed operators in the grinding department who were retained. They were notified of their layoffs by Ed Uroda who was acting in Plant Manager Sikora's stead for the week of 6 August while Sikora was on vacation. Uroda told each of the employees, in separate conversations, that their layoffs would be temporary. According to Chwastek, Uroda said he would be "temporarily" laid off, "he didn't [know] for how long; it might be a week; it might be longer. . . ." According to Culbertson, Uroda responded to his question concerning the length of the layoff by stating that it would "only be for a week or two weeks." Uroda also said, "we are low on through-feed work and there is some coming in from the heat treaters and it

[3] Neither Sikora, Petrey nor Elswick testified in this proceeding and Linklater could not remember when Petrey and Elswick were laid off. However, Respondent's position statement states as follows: "[Linklater] selected George Elswick and Millard Petrey to be laid off and directed Sikora to advise them of the layoff, before Sikora went on vacation. Sikora told Elswick and Petrey that they would no longer be needed on Friday, August 3, 1984." (GC × 14 page 12).

[4] The above was Linklater's initial testimony. Linklater later testified that these layoffs were intended to be permanent. This demonstration of inconsistency was typical of Linklater's testimony and is an example of why I found him to be an unreliable witness. However, I accept his initial testimony that the layoffs were temporary because it is compatible with other evidence in this case. It also was given at a time when candor was most likely since it was in response to a question by counsel for General Counsel before Linklater had an opportunity to reflect and change his testimony to give a more self-serving answer in response to a question from his own counsel. My assessment of his demeanor while he was testifying leads me to conclude that Linklater's admission during his initial testimony carried the ring of truth. I therefore reject Linklater's belated attempt to show that the layoffs were permanent.

should only take a week or two, we will give you a call." Jones' testimony is not quite as clear on the temporary nature of the layoff, but it is nonetheless supportive of that view of Uroda's remarks, especially since all three employees were laid off under the same circumstances. According to Jones, Uroda told him that "possibly when things pick up" he would be recalled. These witnesses were each candid and believable and their testimony was not disturbed on cross-examination. I therefore credit their testimony.[5]

[5] In its brief Respondent alleges that in the representation proceeding, which was held on 23 October 1984, Culbertson testified differently about what Uroda had told him. Although the transcript of the representation case is a part of the record in this consolidated case, I asked the parties at the beginning of the trial to specify, during the trial, which part of the representation case transcript they would be relying upon. Despite this request, counsel for Respondent never specified, during the hearing, that he would be relying on Culbertson's representation case testimony and never confronted Culbertson with his prior testimony. Thus, Culbertson was never asked to explain whether there was a conflict between his present testimony and his testimony in the prior hearing. Nor was counsel for the General Counsel given an opportunity to address the alleged inconsistency. Counsel for Respondent simply asked whether Culbertson had testified in the representation proceeding and Culbertson replied that he had.

In considering the Respondent's allegation, I have reviewed the transcript in the representation case. Having read and considered Culbertson's testimony in the representation case, I find no conflict or any other reason to discredit his testimony before me, particularly in view of the fact that I was favorably impressed with his demeanor as a witness. Culbertson's testimony before me that Uroda told him the layoff would last a few weeks was reaffirmed on cross-examination. He stated that Uroda "Made it clear to me that [the layoff] was a temporary situation." In the representation case, Culbertson was asked by Union counsel who had informed him that he was laid off. Culbertson answered, "Ed Uroda. As a matter of fact his wording was Mike, I'm sorry but at twelve thirty I'm going to have to lay you off. I said for what, and he said because we have no work." A follow-up question by the hearing officer yielded no significant elaboration and counsel for Respondent did not ask any questions on the point. Culbertson simply related how he was informed of the layoff; he did not purport to give the entire conversation between him and Uroda. There was thus no conflict between Culbertson's rather curt summary response in the representation case and his more complete and detailed testimony before me. Indeed, the entire focus of the question about the layoff in the representation case and a central purpose for the entire hearing was to determine whether Uroda was a supervisor and thus ineligible to vote in the election. The hearing officer specifically stated several times during the representation hearing that he was aware that unfair labor practice charges had been filed concerning the layoffs of Culbertson and Chwastek, but that he was not going to take evidence on that issue. In these circumstances, nothing in Culbertson's testimony in the representation hearing can be viewed as inconsistent with his testimony before me. For

Contrary to the testimony of Culbertson, Jones and Chwastek, Ed Uroda testified that he did not tell the men that their layoffs would be temporary. Neither did he testify that he told them the layoffs would be permanent. He testified simply that Linklater did not tell him the length of the layoffs, but told him only "to lay them off, because of a shortage of work."[6]

I do not credit Uroda's testimony insofar as it conflicts with that of the laid-off employees. Not only was their testimony essentially corroborative on this point, but it was consistent with Linklater's admission that the layoffs of Petrey and Elswick several days before were temporary. Since all five employees were sent the same layoff letter on the same day, it is reasonable to infer that all five were laid off under the same conditions. Moreover, Uroda's testimony conflicts with Linklater's on two important points. Unlike Linklater, Uroda says nothing about his own advice to Linklater that there was a work shortage which led to Linklater's decision to lay off employees. This is significant because if, as I believe, and as Linklater testified, the decision was spawned by a report from Uroda that work was down, it more likely was the result of a temporary situation than a predetermined judgment. My view is reinforced because Sikora, the plant manager, was not present when the through-feed operators were laid off. He would undoubtedly have participated in a decision which called for permanent layoffs. Indeed, according to Uroda, Linklater said nothing about the length of the layoffs. Secondly, Uroda did not corroborate Linklater's testimony

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these reasons and because his testimony before me was reaffirmed on cross-examination, was the product of a witness with an impressive demeanor, and was compatible with that of two other employees laid off at the same time, I cannot discredit Culbertson's testimony before me.

[6] Linklater did not initiate the layoffs. According to Linklater, Uroda and another employee approached him and told him "there was not enough through-feed work to last through the day." Linklater then told Uroda to lay off three of the five through-feed operators. Although Uroda was not a supervisor within the meaning of the Act, he was, during the week in question, acting plant manager and was specifically authorized to lay off employees. Since he had conferred with Linklater immediately before implementing the layoffs, his remarks to the laid-off employees are not only authoritative but carry a special persuasive force.

that he was out of the office on the last 2 days of the week. This is a crucial point because it would have been very unusual that Uroda alone was in charge of the grinding department for 2 days; he would undoubtedly have remembered and firmly corroborated his boss on this point if that were so. Instead, Uroda testified that he "guessed" that Linklater was at the facility all week, although he was "not that sure." In light of these conflicts and in the face of the mutually consistent and credible testimony of the three employee witnesses, I cannot accept the testimony of Uroda or that of Linklater, who did not impress me generally as a reliable witness, which might conflict with my finding that the three through-feed operators were laid off only temporarily.

My finding is also supported by other evidence. An employee list dated 6 August contains the names of Petrey and Elswick, thereby confirming that their layoffs — at that point — were intended to be temporary. In addition, documentary evidence shows that, in past years, most laid-off employees were actually recalled. Indeed, Linklater admitted that it was unusual to have permanent layoffs. Moreover, documentary evidence shows that, after the election, Respondent not only hired new plunge grinders but also increased significantly the number of temporary employees it utilized. Several employee witnesses credibly testified that many of these temporary employees also did through-feed work. After some reluctance, Linklater himself testified that temporaries were utilized for through-feed work. The record also shows that, in October, Respondent began running a second shift. And documentary evidence shows that, in September and October, there was a dramatic increase from the prior 2 months in work performed for a company called Condomatic, for which, Linklater testified, Respondent performs "through feed grinding only." Thus, the evidence is really overwhelming that the layoffs of employees Petrey, Elswick, Culbertson, Jones and Chwastek were originally intended to be temporary and, under normal circumstances, would have remained temporary.

However, in letters postmarked "pm," 13 August 1984, and dated 7 August, Linklater told the five temporarily laid-off employees named above that their layoffs were permanent, citing the loss of work from certain named companies as the reason. The letters read as follows:

> Linklater Manufacturing Company has been experiencing a continuing cutback in orders. This has been due to our company's inability to successfully compete for work from Roper, Robbins and Myers and other customers. Additionally, Ford recently informed us that they would begin performing two of our best jobs in house by the end of this month.
>
> Unfortunately, these cutbacks in orders have forced us to reduce our work force. We regret to inform you that you will be laid off August 7, 1984, and that we expect this layoff to be permanent. Please be sure to remove any of your personal belongings, including tools, from our premises as we cannot be responsible for them. Your final paycheck will be mailed to you on August 15, 1984.

B. Section 8(a)(1) Violations Against Employees Culbertson, Kish and DiPerna

Sometime in June 1984, before Culbertson initiated union organizing activities, he had a conversation with Plant Manager Stan Sikora. According to Culbertson's uncontradicted testimony, which I credit, he was scheduled to work overtime and asked Sikora if he could be released early because he needed to go to his ba[illegible]. Sikora stated that Respondent needed people to work overtime and get production out. He also stated that Respondent would start cracking down on people who did not want to work overtime. Culbertson then remarked that this was why he thought the employees should have a union "around here." Sikora responded, "if the old man [referring to George Linklater, Respondent's owner and

president] hears you saying things like that" it would be the "quickest way for you to lose your job." Culbertson repeated the conversation to a "few" other employees.

Sikora's remarks were clearly unlawful. They threatened retaliation for even talking about forming a union. Respondent's assertion that the remarks were not taken seriously is not supported by the record. Culbertson answered a leading question to that effect by stating, "not really," and then mentioning that he did take seriously the Respondent's attitude on overtime. Moreover, Culbertson thought seriously enough about the remarks to repeat them to other employees. In any event, the law proscribes threats of retaliation because of their tendency to coerce without regard to the subjective views of particular employees given in response to questions at a formal hearing months after the events. See, *Hendrix Mfg. Co. v. NLRB.*, 321 F.2d 100, 105 (C.A. 5, 1963).

Uncontradicted testimony also establishes that Sikora approached employee Robin Kish at his work station sometime in August of 1984. Sikora asked Kish how he "felt about the union." Even though Kish had signed an authorization card, he responded that he "didn't see that it would do me any good . . . ." Sikora responded that the employees should be sure of what they were doing because supporting a union was a "big step." Sikora stated that he, Sikora, "didn't like" the idea of a union and he also stated that Linklater would not "tolerate" a union "being in his shop." He also stated that selection of a union "would be a mistake because we wouldn't benefit from it."

Considering all the surrounding circumstances, I find that Sikora's interrogation was unlawful. Sikora did not state any lawful purpose for the questioning and gave no assurances against reprisal. Indeed, he intimated the opposite since he said that President Linklater would not "tolerate" a union. He also said that forming a union would be a "mistake." These additional remarks clearly indicated the Respondent's displeasure towards one who would answer that he thought favorably of a Union. So far as the record shows, Kish was

not known to be an open union supporter. Indeed, Kish responded ambiguously to the question even though he had just recently signed a union authorization card. Finally, Sikora, not Kish, initiated the conversation about the Union. Thus, the question by a high official of Respondent was coercive in that the employee might well believe that, if he answered that he favored the Union, the information could be used for future discrimination.

According to further uncontradicted testimony, Sikora also approached employee Jeff DiPerna at his work station sometime in mid-August. Sikora asked if DiPerna had signed a "UAW card." DiPerna gave a non-committal response and simply told Sikora that he had previously belonged to the Union but had lost his job and had a "bad experience." DiPerna had in fact signed a union card about 2 weeks before.

This interrogation was likewise unlawful. There was no lawful purpose for the question and no assurances against reprisal given by Sikora. DiPerna gave a non-committal response even though he had in fact signed a card. There was no evidence that this was a friendly exchange and the plant manager, the second highest management official with Respondent, initiated a conversation about the Union. Thus, here again, in all the circumstances, Sikora's questioning was coercive and violative of the Act.

Sometime in August or September, prior to the Board election, Linklater made some threats to employee Jeff DiPerna. DiPerna testified that he requested that Linklater sign a document for him in connection with a home-loan application. Linklater told DiPerna that he would sign the document but that he didn't like "this Union idea." Linklater said that there were long-time employees who "could lose their jobs because of the Union."

I credit DiPerna's testimony. He impressed me as an honest and candid witness whose testimony survived cross-examination. He was testifying under subpoena and was considered by Linklater to be on leave of absence when

he testified. Linklater, on the other hand, did not specifically deny the above conversation took place although he did generally deny threatening employees. More importantly, as is discussed more fully elsewhere in this Decision, Linklater did not impress me as a reliable or credible witness.

Based on my credibility determination, I find that Linklater's remarks to DiPerna amounted to a threat of retaliation against employees for supporting the Union. Linklater's suggestion that employees would lose their jobs because of the Union was not based on any economic considerations or matters outside of Respondent's control. Indeed, his expression that he did like the idea of a union made it clear that it was his own attitude toward the Union which would cause the employees to lose their jobs. And, as owner and president of Respondent, he had the power to implement his suggestions. Linklater's remarks were thus coercive and violative of the Act. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 619 (1969).

C. The Discriminatory Layoff Changes

The General Counsel contends that the five layoffs of 3 and 7 August were changed from temporary to permanent because of the advent of union activities. The General Counsel contends that the change was made after receipt of the Union's election petition and that Respondent seized on this opportunity to make sure that Culbertson, who was known to favor a union, and four other potential union voters would not vote for a union in the upcoming election. More specifically, the General Counsel contends that the 13 August layoff letters were written and mailed after receipt of the election petition. The evidence establishes that the election petition was received at 10 a.m. on 13 August and that the layoff letters were postmarked "pm" 13 August.

Respondent contends, based on the testimony of Linklater and his secretary, Martha Collier, that the 13 August

layoff letters were signed befored the election petition was received on the morning of 13 August and were given to the postman as he left the Respondent's facility. I reject this contention because I do not credit the testimony of Linklater and Collier. First of all, I found Linklater an unreliable witness who was ambiguous, contradictory, and evasive in parts of his testimony. I also believe that Collier, who admitted to having discussed this matter with Linklater before testifying, was guided by an interest in supporting the testimony of her boss. Secondly, their testimony conflicted on a very significant point. Linklater testified that he dictated the letters on 8 August or 9; Collier testified that they were submitted to her in handwritten form. Nor is their overall testimony plausible. The two plunge grinders had been laid off on 3 August. Why would Linklater wait 10 days to send letters to them confirming the layoffs, date the letters 7 August and state that "You will be laid off August 7." The same question must be asked about the other layoffs which had been implemented on 7 August. Moreover, if the letters were dictated or drafted on 8 or 9 August, why would the letters say the employees "will be laid off?" In addition, while it is unnecessary to go into details concerning the whereabouts of Linklater on Thursday and Friday, 9 and 10 August, his testimony that he was gone from the office from noon Thursday to Monday morning and thus could not sign the layoff letters that week does not ring true. His plant manager was on vacation that week and Linklater testified that usually either he or Sikora — the only two supervisors in the grinding department — was always present at the facility. It does not seem likely that he would leave the plant in the hands of an employee, Uroda, for such a long period of time. Indeed, Uroda could not even corroborate Linklater on this point. For all of these reasons, I reject the testimony of Linklater and Collier and find not only that their testimony is untruthful but that the truth is the opposite of their story — the layoff letters were written and mailed after

receipt of the election petition. See, *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).[7]

Since the evidence clearly and unequivocally shows that the five employees laid off on 3 and 7 August were temporarily laid off, the fact that their layoff letters sent on 13 August changed those layoffs to permanent raises the question why this was done. The most obvious reason is the receipt of the election petition that same day. Linklater and Sikora were admittedly "quite surprised" at receipt of the petition. Sikora knew of Culbertson's view that it would be a good idea to have a union in the plant and he threatened Culbertson that formation of a union would result in discharge. This expression of antiunion animus was not isolated. It was exhibited many times thereafter by both Sikora and Linklater who impressed me as being particularly concerned about the possibility of a union in his facility. Indeed Sikora said that Linklater would not "tolerate" a union. The evidence of animus both before and after receipt of the petition convinces me that such animus existed when the petition was received and that it motivated the Respondent's precipitous change of the layoffs from temporary to permanent. The timing of the change

[7] The counsel for the General Counsel makes an argument in her brief that the layoff letters were postmarked 1 p.m. and that this means they were not given to the mailman on the morning of 13 August when he delivered the notice that an election petition was filed because he would not have reached the post office until after 2 p.m. She refers to two of the envelopes enclosing the letters received in evidence. However, those envelopes indicate only that they were postmarked "pm," not that they were marked with any particular time. There was no testimony concerning the Postal Service's policy in time stamping envelopes and I have been administratively advised that the Postal Service does not stamp envelopes as to the hour but refers only to "pm" or "am." Thus, the stampmark which indicates that the layoff letters were mailed after noon ("pm") on 13 August is consistent both with the contention of the General Counsel that the letters were mailed after receipt of the election petition and of the Respondent that the letters were given to the mailman at the same time he delivered the letters notifying Respondent of the election petition. Accordingly, while I have no doubt that the letters were mailed after receipt of the petition, I do not rely on the General Counsel's specific argument relating to an alleged 1 p.m. time stamp on the envelopes.

reinforces the finding I make that the change was discriminatorily motivated.[8]

The Respondent may, of course, escape the natural inference of discrimination established by the above evidence. But it has the burden of showing that the change of the temporary layoffs to permanent would have taken place even in the absence of the union activity. As the Board has stated, a respondent "cannot carry this burden by showing that it also had a legitimate reason for the action, but must 'persuade' that the action would have taken place even absent the protected conduct 'by a preponderance of the evidence' (citations omitted)." *Centre Property Management*, 277 NLRB No. 154, 121 LRRM 1108, 1109 (December 31, 1985). Respondent has not carried its burden persuasively. It presented much evidence — based primarily on the oral testimony of Linklater — that its work was down. I cannot accept this testimony because of Linklater's unreliability as a witness.[9]

[8] Although several of the laid-off employees had signed cards and engaged in union activities, it is unnecessary to the finding of discrimination that Respondent specifically knew of the union activities of each of the discriminatees. It is sufficient that it knew of or suspected Culbertson's involvement and knew of the filing of the election petition and reacted to purge itself of possible prounion supporters. The Respondent's reaction was thus in the nature of a "power display" in response to the advent of the Union and was unlawful without regard to specific knowledge of the prounion activities of particular employees. See *Majestic Molded Products, Inc., v. NLRB*, 330 F.2d 603, 606 (C.A. 2, 1964); *NLRB v. Rich's Precision Foundry, Inc.*, 667 F.2d 613, 628 (C.A. 7, 1981). See also *ARA Leisure Services v. NLRB*, 121 LRRM 2598, 2604 (C.A. 4, January 28, 1986) ("It is reasonable to conclude that [the employer] simply seized the moment to wipe out a picket of suspected union support without waiting for actual confirmation that each employee discharged actually supported the Union.")

[9] Linklater testified that he knew in mid-July that he was losing work from Robbins and Myers and Roper and that certain work from Ford, his major customer, was being delayed. He supposedly learned of this in converations with purchasing agents. Yet he hired several employees in July, including one on 31 July, and none of the documentary evidence submitted supports his testimony. Purchase order forms submitted by Respondent simply confirm that orders were placed for work to be performed through a certain date. There was no documentary evidence indicating a loss of business or establishing the dates or reasons for the loss. Indeed there was documentary evidence showing that work for Robbins and Meyers and Ford continued and that the Ford work increased substantially later in the year. The work for Condomatic — which involved through-feed grinding — actually increased dramatically after the August layoffs. Furthermore, the record also shows

More precisely, none of Linklater's testimony focuses on the important issue here: What happened between 7 August and 13 August to turn temporary layoffs into permanent layoffs? 7 August was a Tuesday. Sikora was on vacation that week and Linklater, according to his own testimony, was not at the plant after Thursday noon and was occupied through Sunday with a golf tournament. Indeed, since Linklater testified he dictated the letters on 8 or 9 August, whatever precipitated the change would have had to take place on 7 or 8 August. Nothing in the record even remotely suggests that some business or economic event caused Respondent to make the change in the layoffs after 7 August. Respondent's evidence is simply not susceptible to any interpretation which would explain a change in position in the nature of the layoffs. The one event that did occur, of course, between the announcement of temporary layoffs and their change by letter into permanent layoffs was the receipt of the election petition. In these circumstances, I find that Respondent has failed to show that the layoffs would have been changed from temporary to permanent in the absence of union activities.

The Complaint also alleges that Chris Venticinque's layoff, like the other five, was changed from temporary to permanent for discriminatory reasons. The evidence shows that Venticinque, a toolmaker who signed an authorization card given to him by Culbertson on 3 August, was laid off on 15 August. He was sent a layoff letter on 16 August stating that his layoff was permanent. According to the uncontradicted testimony of employee James Guthrie, Joe Venticinque, Respondent's engineer and a supervisor within the meaning of the Act, told Guthrie that Chris, his son, had gotten into an

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that, after the layoffs, Respondent hired more plunge grinders and utilized more temporary employees to perform through-feed work. Ironically, in an attempt to secure a better deal from Ford, Linklater, in a November letter to Ford officials, told them that he needed more money because he was going to have to pay more to his employees due to "added costs of a union contract which is now being negotiated with the UAW." This not only was not true, as Linklater admitted at the hearing, but Linklater had worked mightily to prevent this eventuality from occurring. In these circumstances, I cannot accept Linklater's explanation for his conduct relating to the layoffs.

argument with a fellow employee about the Union and was laid off the same day. This was the only record evidence concerning Chris Venticinque's layoff since neither Chris nor Joe Venticinque testified in this proceeding.

The General Counsel asserts that Venticinque's layoff was "in effect 'converted' " to permanent at the outset because his layoff would have been temporary "in the absence of the organizing campaign." I disagree. In the absence of any evidence concerning the nature of Venticinque's layoff, I cannot make such a finding. Indeed what little evidence I have on this point suggests that Venticinque was terminated for getting into a fight. There is no evidence that he was treated differently than other nonunion employees who may have been involved in fights. The General Counsel never alleged that the layoff itself — the termination — was unlawfully motivated. The only notification to Venticinque that appears in the record shows that he was permanently laid off. Unlike the other five layoffs considered above, there was no significant intervening cause — receipt of the election petition — between Venticinque's layoff and the confirmation letter. In these circumstances, I find that the General Counsel has not proved by a preponderance of the evidence that Venticinque's original layoff was temporary and that it thereafter was converted to permanent for discriminatory reasons.

D. Section 8(a)(1) and (3) Violations Committed against Employee Guthrie

Employee James Guthrie was a veteran employee who had worked for Respondent since 1976. He was a machine repairman. He had had a poor attendance and tardiness record

throughout his employment but it had been tolerated without disciplinary action or written warnings until the advent of the union campaign in August of 1984.[10]

On 24 August, Linklater gave Guthrie a written warning for absenteeism, tardiness and leaving work early. This was the first written warning issued to Guthrie for absenteeism or tardiness. Linklater told Guthrie that he would have to take some action if Guthrie did not "straighten up."[11]

In early September, Linklater loaned $150 to Guthrie in cash. Linklater had a policy of lending employees money and he does not deny that he did lend money to Guthrie on this occasion. He had loaned Guthrie money in the past which Guthrie had always repaid. Shortly after the September loan, however, Linklater told Guthrie that he could forget about repaying the loan if he did not show up to vote in the election of 27 September.[12]

On 11 September, Guthrie attended a union meeting at Culbertson's house. The next day he was called in to Linklater's office. Linklater asked him how the meeting went. He also said that he knew that some 36 employees had signed union cards and asked Guthrie the identity of the union organizers. He also asked why Guthrie wanted a union. Guthrie gave an ambiguous reply. Linklater also told Guthrie that he would make it impossible for Guthrie to draw unemployment

[10] Guthrie conceded that he had participated in one meeting where management officials Linklater and Sikora had told him to improve his attendance record. The date and details of this meeting are unclear. Guthrie also conceded that Sikora may have mentioned his attendance record to him "a couple" of times.

[11] The General Counsel alleges that, during this conversation, Linklater told Guthrie that Guthrie's tardiness and warning could be "overlooked" if there were no union at the facility. While Guthrie did testify to this effect, the testimony was ambiguous, in response to a leading question and not placed in context. Moreover, Guthrie stated that "at that point I had straightened out." This was unlikely since he had just received the warning. While something of the sort probably was said to Guthrie, Guthrie's testimony on this particular point is insufficiently precise for me to make the finding suggested by the General Counsel.

[12] Guthrie's testimony on this point was straightforward and candid. I credit his testimony over Linklater's denial that he conditioned the repayment of the loan on Guthrie's not voting in the election. As I have indicated previously in this Decision, I found Linklater to be an unreliable witness.

benefits although he did not directly threaten a layoff. The meeting lasted over half an hour.[13]

Also on 12 September, apparently in a separate conversation with Linklater, Guthrie complained about being "harassed" by Plant Manager Sikora and another employee about his allegedly being a union organizer. Linklater promised to talk to Sikora and the other employee about this matter. Linklater conceded that this conversation took place. I do not credit Linklater's further testimony that this was the only conversation he had with Guthrie about the Union.

Guthrie also credibly testified that, on three or four separate occasions during the election campaign, Linklater called Guthrie into his office and asked him which employees had signed union authorization cards. Guthrie refused to give Linklater the names of the card signers. Linklater also told Guthrie that if the Union succeeded in gaining recognition, he would stop loaning money to employees. I do not credit Linklater's denials that he engaged in these conversations.

In conversations with Guthrie during the 2 days prior to the election, Linklater told Guthrie that he should not vote in the election and that he wanted Guthrie not to come to work the day of the election and to go fishing. Guthrie reported to work on 27 September, the day of the election.[14] Throughout the morning Linklater followed Guthrie around and asked him to leave. Guthrie stated that he could not afford to take the day off, but Linklater responded that he should not worry

[13] On this point Guthrie, who had vision and reading problems, had his recollection refreshed by having his pretrial affidavit read to him. Guthrie credibly affirmed that his affidavit was true in this respect. His testimony on this point survived vigorous cross-examination. I am convinced that he was an honest witness whose testimony on this point, even though it consisted primarily of adopting his written and sworn pretrial affidavit, was far more reliable than Linklater's denial.

[14] The election was to be held from 11 a.m. to noon at the Respondent's plant.

about it. Despite Linklater's efforts, Guthrie voted in the election.[15]

On Saturday, 29 September, a number of employees were scheduled to work. Several, including Guthrie, did not report for work. On Monday, 1 October, Linklater issued Guthrie a one-week suspension for missing work on Saturday. Linklater called Guthrie a "gutless son-of-a-bitch" for voting the previous Friday. He also stated that he was going to make it impossible for Guthrie to work for Respondent. Here again, I credit Guthrie's testimony and reject Linklater's denial that he called Guthrie a "gutless son-of-a-bitch" based on my assessment of the reliability and demeanor of both men as witnesses before me.

Based upon my credibility determinations, I find that Linklater, on several occasions, interrogated Guthrie concerning his and other employees' union activities. In all cases the questioning took place in Linklater's office, the locus of ultimate authority in the plant. There was no lawful purpose given for the questioning and no assurances against reprisals. Indeed, Linklater threatened reprisals — cutting off the informal loan program and fighting unemployment benefits in the event of layoff. In all the circumstances, such interrogations were violative of the Act.

Linklater also threatened reprisals, as I have indicated. He threatened that if the Union won recognition, he would stop his informal policy of making loans to employees. He also threatened that he would fight unemployment benefits for Guthrie. At this point other employees had been laid off and, even though no direct threat of layoff was made to Guthrie, Linklater's comments implied a layoff. In context, Linklater implied that, if Guthrie did not cooperate and support Linklater in the election, Respondent would contest

[15] Guthrie's credible and straightforward testimony in this respect is corroborated by employee DiPerna who testified that Linklater was following Guthrie on election day and stated that something about Guthrie made him nervous. I therefore reject Linklater's denial that he followed Guthrie or attempted to get Guthrie not to vote in the election.

unemployment benefits in the event of Guthrie's layoff. These statements are unlawful threats of reprisal based on union considerations.

Linklater also promised benefits. Thus, he told Guthrie that Guthrie's $150 loan would not have to be repaid if he refused to vote in the election. This was an unlawful promise of benefit based on union considerations.

The evidence also shows that, on several occasions, Linklater attempted to get Guthrie not to vote in the Board election. The inference is clear that he used his authority as an employer to coerce Guthrie on these occasions not to vote. In the context of the other unfair labor practices committed by Linklater, this conduct also constitutes a violation of Section 8(a)(1) of the Act.

The General Counsel also alleges that both the 24 August warning and the 1 October suspension were violative of the Act because they were based on discriminatory considerations. Although the 24 August warning was issued after the receipt of the election petition and the unlawful conversion of the grinding department layoffs, I cannot conclude that the warning was issued for discriminatory reasons. The record reveals no reason why Linklater would focus on Guthrie on 24 August as a union leader or adherent. It was not until mid-September that Linklater began focusing on Guthrie as a foil for his antiunion efforts. He even gave Guthrie a loan in early September after the warning letter was issued. It is conceded that Guthrie's attendance record was poor. Although Respondent tolerated Guthrie's poor record for many years and it was not Linklater's policy to issue warning letters to employees, in the absence of specific knowledge of Guthrie's union activities or a reason for Respondent to focus its antiunion animus on him, I cannot find a violation here. I am well aware of Respondent's blunt and antiunion conversion of temporary layoffs to permanent just a few days before Guthrie's warning. But that action was a general reaction to the advent of union activities and not focused on any particular individual, except perhaps Culbertson, who was known

to have suggested a union. Thus, on that occasion, Respondent made a power move to blunt the union drive at its inception by cutting off employees from the eligibility list. But that action does not explain why it would focus on Guthrie 2 weeks later by keeping him on the rolls and simply isuing him a warning letter. Thus, although the question is a close one, I do not believe that the General Counsel has shown persuasively, by a preponderance of the evidence, that the 24 August warning was issued for discriminatory reasons.

The 1 October suspension is a different matter. By that time Linklater was well aware of, or at least suspected, that Guthrie was a leading union adherent. Indeed, he had questioned Guthrie about his union activities and those of other employees, had threatened him with reprisals and promised him benefits. He had tried to prevent him from voting in the Board election and, when Guthrie voted anyway, he called Guthrie a "gutless son-of-a-bitch." Ironically, it took plenty of guts for Guthrie to defy Linklater and exercise his right to vote. That statement by Linklater was made at the time he suspended Guthrie allegedly for missing work on Saturday. In these circumstances, the evidence is overwhelming that Respondent suspended Guthrie on 1 October for his known or suspected union activity.

Respondent contends that Guthrie would have been suspended for missing work on Saturday even in the absence of union considerations. I reject that contention. Several other employees missed work that Saturday but there is no evidence that they were punished or disciplined in any way. Moreover, the credible evidence shows that Linklater attempted to get Guthrie not to work on Friday — a normal workday. Guthrie actually missed work on Saturday which was not a normal workday, although it is true that he was advised late Friday afternoon that he would be expected to work on Saturday. It is unrealistic to believe that Linklater, if he meant to discipline an employee for missing work on a Saturday, in the absence of union considerations, would have referred to the employee, as he did, as a "gutless son-of-a-bitch" and

threatened to make it impossible for him to work for Respondent. In explaining Guthrie's suspension, Linklater also testified that Guthrie's "attitude was changing considerably." When viewed in the context of Linklater's concern over Guthrie's union activities, these comments belie a discriminatory motive. This evidence is far more significant than the fact that Guthrie had a poor attendance record. Respondent had tolerated Guthrie's poor attendance record for years. It was only after the onset of the Union and after Guthrie's defiance of Linklater by voting in the Board election that his attendance record became intolerable. In these circumstances, Respondent has failed to rebut the inference of discrimination. See *Centre Property Management, supra.*[16]

E. Resolution of the Election Issues

The votes of two employees, Culbertson and Chwastek, are outcome determinative. They are entitled to vote if they

[16] After I had elicited facts which occurred subsequent to the completion of Guthrie's suspension in order to obtain a full picture of his employment history, counsel for the General Counsel moved to amend the Complaint to add to the Guthrie allegations that he was unlawfully laid off following the end of his suspension. I denied the amendment at the hearing and I reaffirm that denial here. The motion was made at the second session of the hearing after a 6-week extension of time had been granted because some of the General Counsel's witnesses had not answered their subpoenas. The original complaint allegations involving Guthrie only challenged the legality of the suspension. In fact the Complaint seeks backpay for Guthrie only "from the date of his suspension to the date of his layoff." No new or previously unavailable evidence was cited as a reason for the amendment which I suspect was made on the spur of the moment without consultation with the Regional Director or consideration of the extent of the pre-trial investigation. Moreover, there was no assertion that any of the Respondent's layoffs during 1984 were unlawful in and of themselves. The Complaint issue relating to the August 1984 layoffs was that they were made permanent for unlawful reasons. It appears that Guthrie's layoff was temporary since he was recalled about a month later. Thus, there could be no contention that his layoff was made permanent. Further, the amendment was made deep into the General Counsel's case at a time when Respondent would have had to completely change the focus of its defense. An amendment at such a late stage of the proceeding would have unduly prolonged the hearing and injected issues inconsistent with the General Counsel's theory of the layoff phase of the case. Accordingly, I must conclude that the motion to amend was not timely made and, if granted, would have prejudiced the Respondent. In any event, it would have raised issues that were not sufficiently related to the remaining complaint allegations to be tried together with them in the instant case.

are deemed on temporary layoff with a reasonable expectation of recall. See *Atlas Metal Spinning Co.*, 266 NLRB 180 (1963).

The evidence herein clearly shows that Culbertson and Chwastek were temporarily laid off on 7 August. Their layoffs were changed to permanent several days later for discriminatory and unlawful reasons. In the absence of such unlawful action, Culbertson and Chwastek would have been considered by the Board to be temporarily laid off and eligible to vote. I therefore conclude that Culbertson and Chwastek were eligible to vote in the 27 September 1984 election and their ballots should be opened and counted. The Regional Director should thereafter prepare a new revised tally of ballots and certify the results of the election.

Conclusions of Law

1. By coercively interrogating employees about their union activities and those of other employees, threatening reprisals, including discharge, and loss of benefits if the employees selected a union, promising benefits if employees rejected a union, and attempting to convince employees not to participate in a Labor Board election, the Respondent has violated Section 8(a)(1) of the Act.

2. By converting the temporary layoffs of employees Michael Culbertson, Chris Chwastek, Donald Jones, Millard Petrey and George Elswick to permanent layoffs to prevent their being eligible to vote in a Board election and generally to discourage union activities, the Respondent has violated Section 8(a)(3) and (1) of the Act.

3. By suspending employee James Guthrie for one week because of his union activities, Respondent violated Section 8(a)(3) and (1) of the Act.

4. The above violations of the Act are unfair labor practices which interfere with interstate commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not otherwise violated the Act.

6. Employees Michael Culbertson and Chris Chwastek were on temporary layoff at the time of the election and, absent Respondent's discriminatory treatment of them, eligible to vote in the election because they would have had a reasonable expectancy, absent discrimination, of being recalled.

7. The challenges to the votes of Culbertson and Chwastek are overruled. Their votes are to be counted and the Regional Director of Region 7 is directed to prepare a revised tally of ballots and certify the results of the election of 27 September 1984.

The Remedy

I shall recommend that Respondent be ordered to cease and desist from engaging in the conduct found unlawful herein and to post an appropriate notice. I shall also recommend that Respondent make whole employee James Guthrie for the loss of pay and benefits he suffered because of the unlawful suspension by Respondent under applicable Board law relating to backpay. I shall also recommend that the layoff letters to employees Culbertson, Chwastek, Jones, Petrey and Elswick be rescinded and that Respondent return those employees to the *status quo ante* and treat them as temporarily laid-off employees as of 13 August 1984, subject to recall when their former positions or work for which they are qualified thereafter becomes available. If it is determined that they would have been recalled after 13 August 1984 under such circumstances they will be entitled to backpay, together with interest, in accordance with applicable Board law relating to backpay.

ORDER[17]

Respondent, Link Manufacturing Company, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees about their union activities and those of other employees.

(b) Threatening employees with reprisals, including discharge, and loss of benefits if they select a union.

(c) Promising employees benefits if they reject a union.

(d) Attempting to convince employees not to participate in a Labor Board election.

(e) Converting temporary layoffs of employees into permanent layoffs, suspending or otherwise terminating or discriminating against employees in order to prevent employees from voting in a Board election, because they voted in an election, or to discourage union activities.

(f) In any other manner interfering with, restraining or coercing its employees in the exercise of their Section 7 rights.[18]

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make employee James Guthrie whole for any loss of pay or benefits he may have suffered because of Respondent's unlawful action against him.

(b) Place employees Culbertson, Chwastek, Jones, Petrey and Elswick on a preferential recall list as of 13 August 1984 and treat them as temporarily laid-off employees

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections thereto shall be deemed waived for all purposes.

[18] I find, based on the unfair labor practices found herein and Linklater's demonstrated antiunion animus, particularly his attempt to prevent an employee from voting in a Board election, that Respondent has evinced a proclivity to violate the Act.

subject to recall from that day forward when and if their former positions or any other work for which they might be qualified becomes available. In the event that these employees would have been recalled, absent their unlawful terminations, Respondent is to make them whole for any loss of earnings or benefits which they may have suffered as a result of Respondent's unlawful action in the manner set forth in the "Remedy" section of this Decision.

(c) Remove and expunge from its records and files any notations dealing with the layoffs of the employees found to have been discriminated against herein and notify them in writing that this has been done and notify them that evidence of such unlawful conduct will not be used in future personnel actions.

(d) Post at its facility in Oak Park, Michigan, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by Respondent's authorized representative, shall be posted by it immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Decision, what steps the Respondent has taken to comply herewith.

[19] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS ALSO ORDERED that the Regional Director for Region 7 open and count the ballot of employees Culbertson and Chwastek and thereafter issue a final tally of ballots and certify the results of the election of 27 September 1984.

IT IS FURTHER ORDERED that those allegations of the Complaint not found herein to be sustained are dismissed.

Dated, Washington, D.C. 6 March 1986

/s/ ROBERT A. GIANNASI

Robert A. Giannasi
Administrative Law Judge 3-3-86

APPENDIX **JD–54–86**

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE NATIONAL LABOR RELATIONS ACT AND HAS ORDERED US TO POST AND ABIDE BY THIS NOTICE.

WE WILL NOT coercively interrogate employees about their union activities and those of other employees.

WE WILL NOT threaten employees with reprisals, including discharge, and loss of benefits if they select a union.

WE WILL NOT promise employee benefits if they reject a union.

WE WILL NOT attempt to convince employees not to participate in a Labor Board election.

WE WILL NOT convert temporary layoffs of employees into permanent layoffs, suspend or otherwise terminate or discriminate against employees in order to prevent employees from voting in a Board election, because they vote in an election, or to discourage union activities.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of their Section 7 rights.

WE WILL make employee **JAMES GUTHRIE** whole for any loss of pay or benefits he may have suffered because of our unlawful action against him.

WE WILL place employees **CULBERTSON, CHWASTEK, JONES, PETREY** and **ELSWICK** on a preferential recall list as of **13 August 1984** and treat them as temporarily laid-off employees subject to recall from that day forward when and if their former positions or any other

work for which they might be qualified becomes available. In the event that these employees would have been recalled, absent their unlawful terminations, **WE WILL** make them whole for any loss of earnings or benefits which they may have suffered as a result of our unlawful action.

WE WILL remove and expunge from our records and files any notations dealing with the layoffs of the employees found to have been discriminated against and notify themin writing that this has been done and notify them that evidence of such unlawful conduct will not be used in future personnel actions.

LINK MANUFACTURING COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, **Patrick V. McNamara Federal Building, 477 Michigan Avenue — Room 300 Detroit, MI 48226 (Tel. No. (313) 226-3244)**

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Supreme Court Rule 28.1, Link Manufacturing Company makes the following disclosures:

1. Link Manufacturing Company is not a subsidiary or affiliate of another corporation.

2. There is no other corporation, not a party to the appeal, that has a financial interest in the outcome.

ABBOTT, NICHOLSON, QUILTER, ESSHAKI & YOUNGBLOOD, P.C.

By: _____

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